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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-10

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellants Exxon Corporation and Phillips Petroleum Company appeal from a judgment of the highest court of the State of Maryland upholding a Maryland statute against appellants' contention that key provisions thereof violate the federal constitution. The federal questions were properly presented and are substantial.[1]

[1] Separate appeals are being filed by Continental Oil Company and its subsidiary Kayo Oil Company, Gulf Oil Corporation, Shell Oil Company, Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation, and Ashland Oil, Inc., each of which filed separate complaints below, but a Joint Appendix is being used by all appellants.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland containing the judgment of that court reversing the judgments of the Circuit Court for Anne Arundel County is officially reported at 279 Md. 410 (advance reports) and unofficially at 370 A.2d 1102 (advance reports). The supplemental opinion of the Court of Appeals on motions for reconsideration and stay of judgment is reported at 279 Md. 456 (advance reports). The Circuit Court for Anne Arundel County filed two opinions, neither of which has been officially reported. Copies of all four opinions are filed herewith under separate cover as Appendices A (pp. 1a-44a), B (pp. 45a-48a), C (pp. 49a-51a) and D (pp. 53a-134a), respectively.

JURISDICTION

The opinion of the Court of Appeals of Maryland upholding the validity of the challenged statute and specifically rejecting appellants' contentions was filed on February 18, 1977. Motions for reconsideration and for a stay of mandate were timely filed and denied in a supplemental opinion filed April 13, 1977. On that date the Court of Appeals issued its mandate to the Circuit Court to dismiss the complaints. The notices of appeal to this Court (reprinted in Appendix E) were filed on June 27, 1977 with the clerk of the Maryland Court of Appeals and with the clerk of the Circuit Court for Anne Arundel County, the court possessed of the record pursuant to Rule 877 the Maryland Rules of Procedure, Md. Anno. Code (1957) (1977 Repl. Vol.).

Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2). *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907).

STATUTES INVOLVED

Chapter 854, Laws of Maryland 1974, was amended by Chapter 608, Laws of Maryland 1975, and codified in the Maryland Annotated Code (1957), Art. 56, §157E (1972 Repl., Vol. 1976 Cum. Supp.). These chapters ("the Act" or "the Maryland Act") added the following provisions to the Motor Fuel Inspection Law:

> "(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> "(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> "(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> "(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments."

(The italicized provisions are those added by Chapter 608 of the Laws of 1975.)

The pertinent provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13, (sometimes hereinafter referred to as Section 2 of the Robinson-Patman Act) are as follows:

> "§2(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . .
>
> "(b). Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Other pertinent provisions of Maryland law will be found in Appendix F to this Jurisdictional Statement.

QUESTIONS PRESENTED

1. Does the requirement of Paragraph (D) of the Maryland Act that price reductions by suppliers of petroleum products to any dealers supplied in the state be extended uniformly to all such dealers conflict with Sections 2(a) and 2(b) of the Robinson-Patman Act and impair the balance established by Congress between the two statutes regulating pricing practices, the Sherman Act and the Robinson-Patman Act, in violation of the Supremacy Clause of the federal constitution?

2. Does the Act, which flatly prohibits the operation of retail service stations within the State of Maryland by producers or refiners of petroleum products, constitute an undue burden on and an unlawful discrimination against interstate commerce in violation of the Commerce Clause of the federal constitution, particularly when all products covered by the Act are produced and refined outside the State?

STATEMENT OF THE CASE

The Federal Questions Are Properly Presented. The federal questions presented by this appeal were first raised in the bill of complaint filed by appellant Exxon on June 17, 1974 in the Circuit Court for Anne Arundel County, Maryland. Paragraph 10 of the complaint included the following two subparagraphs (E. 263):[2]

> "g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.
>
> "i. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution."[3]

---

[2] "E" references as used herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

[3] Identical provisions are contained in the complaint filed by Phillips. Paragraph 22 of the Exxon complaint further alleged (E. 267): "The requirement of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products 'extend all voluntary allowances uniformly to all retail service station dealers supplied' conflicts with both the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) (part of the Maryland anti-trust law). Under both the federal and state anti-trust laws, unlawful price discrimination can only result from a price difference which adversely affects competition. Paragraph D of the Act requires all allowances to be made on

Subsequent to the filing of the original complaint by Exxon, six other oil companies filed similar complaints. Defendants in all cases were state officials charged with enforcement of the Act. Thereafter motions for partial summary judgment were filed by Shell, Exxon and Gulf. On October 14, 1975, the Circuit Court granted partial summary judgment holding Paragraph (D) invalid on the ground that it invaded a field preempted by Congress and was in conflict with Section 2(b) of the Robinson-Patman Act.

The case thereafter went to trial on the other issues. On January 27, 1976, the Circuit Court entered judgment for the plaintiffs (App. D, p. 134a), holding Paragraphs (B) and (C) to be unconstitutional on a number of grounds, although rejecting plaintiffs' contention that those provisions unduly burdened interstate commerce (App. D, p. 123a). The court reaffirmed its conclusion that Paragraph (D) was invalid in the light of the Robinson-Patman Act.

On defendants' appeal to the Court of Appeals of Maryland, plaintiffs below renewed the constitutional arguments presented to the trial court. The Court of Appeals reversed the judgment of the Circuit Court, holding that all provisions of the Act were constitutional. In particular, the Court rejected plaintiffs' contention that Paragraphs (B) and (C) violated the Commerce Clause and that Paragraph (D) was preempted by the Robinson-Patman Act and the Sherman Act.

Thus, the federal questions presented here were raised by plaintiffs below at all stages of the case in the Maryland courts and were actually decided by the Maryland trial and appellate courts. Since the highest court of Maryland sustained the validity of the Maryland Act against federal constitutional attack, this appeal is properly here under 28 U.S.C. §1257(2).

a state-wide basis regardless of any rationale or justification for the granting of any form of allowance on a more limited geographic basis. This provision of the Act therefore conflicts with and is preempted by the federal law."

Retail Petroleum Marketing in Maryland. No crude oil is produced or refined[4] into motor fuel in the State of Maryland. (App. A, p. 19a). Consequently, all motor fuel sold in the State is transported into the State by pipeline, vessel or truck and distributed to retail outlets from storage tanks located in Maryland or neighboring states for sale directly to consumers.

Consumers may purchase motor fuel from two basic categories of retail outlets: major brand stations and private brand stations.[5] Major brand stations generally are characterized by the sale of advertised brand name products, the availability of repair services, and the acceptance of credit cards. Private brand stations offer products bearing a brand name which is not widely advertised, offer limited or no repair services, accept no credit cards, and normally sell gasoline at prices below those of major brand stations. (App. D, 98a-99a).

As of July 1, 1974 there were approximately 3800 retail gasoline stations in the State of Maryland of which all but 245, or approximately 94 percent, were operated by independent retail dealers. (E. 70-71). 209 of the 245 stations were company-operated stations (i.e., operated by the company with its own employees and under its own brand name) of producers or refiners, 124 by major oil companies and 85 by non-major compan-

[4] Since all the producing companies which operate service stations in Maryland are also refiners, hereinafter "producers and refiners" are sometimes referred to simply as "refiners."

[5] In its supplemental opinion, the Maryland Court of Appeals defined the term "retail service station" as used in Paragraphs (B) and (C) of the Maryland Act to include "gas only" stations which do not offer a full line of automotive services to the motoring public, as well as the conventional service stations. (App. B, pp. 46a-47a).

ies. (E. 70-71).[6] Appellant Exxon, as of July 1, 1974, had 532 retail outlets in Maryland, of which 36 were company operated, and Phillips as of October 1, 1975, had 121 of which 13 were company operated. (E. 76-77, 123).

Facts Relating to the Robinson-Patman Act Issue. Exxon, as well as other major suppliers which market primarily through independent dealers, recognize certain geographic areas in Maryland and elsewhere within which they identify competitive markets for sales of gasoline to their dealers. Some of the trading areas cover geographic areas which cross state boundaries into adjoining jurisdictions. Within such competitive markets, or "trading areas" as they are known in the industry, in order to meet competition from other suppliers, a supplier may from time to time temporarily reduce its wholesale prices or grant temporary allowances to its dealers. These allowances are restricted to the dealers who are offered price reductions from other suppliers or who need them in order to compete with dealers who are receiving price reductions from suppliers competing with the suppliers granting the allowances. The allowances are not extended to all dealers within the State of Maryland. (E. 89, 100, 108).

Facts Relating to the Commerce Clause Issue. The appellants, Exxon and Phillips, promote competition in the marketing of gasoline and the related service station services in Maryland by operating some company-operated stations which compete with other major company-operated stations, with independent dealers of the various major brands, and with the company-operated outlets of various smaller refiners (e.g. Ashland, Petroleum Marketing and Kayo). The

[6] The designation of "major" and "non-major" producers and refiners is that of the Lundberg Survey, Inc., a highly regarded and widely used industry statistical organization. (E. 401).

Maryland statute, if allowed to stand, would create a virtual marketing enclave for local independent dealers by barring *all* company-operated outlets of refiners and producers, all of which ship their motor fuel in interstate commerce.

Because private brands of motor fuel lack brand name acceptance, they must be sold at prices lower than the major brands. Control of the retail price is critical for private brand stations and can only be obtained legally through company-operated outlets. For that reason the vast majority of private brand stations (whether or not affiliated with a producer or refiner) are company-operated. (App. D, p. 99a, E. 383, 453, 456, 488-489, 492, 499). In contrast, most major brand stations are operated by independent retail service station dealers.

Because company-operated stations are vital to private brand marketing, Paragraphs (B) and (C) of the Maryland Act would make it economically infeasible for refiners marketing such brands to continue retail station operations in the State of Maryland. (E. 388-389, 456-458, 492).[7] The record indicates that plaintiff-appellants Ashland (Bi-Lo, Red Head, and Payless brands), Petroleum Marketing (Scot brand), and Kayo (Kayo brand), which operate exclusively through company-operated stations in Maryland, would have to abandon the sale of motor fuel at retail in the Maryland market if they could not operate their own stations.

[7] In reversing the trial court, the Maryland Court of Appeals noted that as to some of these operators no final corporate board decision had been made to withdraw from the Maryland retail market if the Act became effective. From this fact, the court drew the conclusion that it might still be possible for these private brand operators to sell their products to the public in Maryland through independent dealers. (App. A, pp. 23a-24a). This conclusion was, however, contrary to the undisputed testimony that such marketers could not operate profitably in this manner. (App. D, pp. 103a, 109a, 111a, E. 388-389, 456-458, 492).

(App. D, pp. 103a, 109a, 111a, 112a, 119a, E. 389, 457, 492). This would have the effect of shutting off their interstate shipments from outside Maryland to these stations in Maryland.

The Act also eliminates independent marketers now operating in Maryland which contemplate strengthening their businesses by means of "backward integration", that is, integrating backward into refining, or crude production. The effect upon Hudson Oil Company, an aggressive, totally company-operated independent marketer which sells its gasoline in 36 states including Maryland, is illustrative. At the moment Hudson's new refinery comes "on stream," thereby strengthening the company's competitive posture, it will be forced out of the State by the terms of the Act. (App. D, p. 112a, E. 498-500).[8]

In addition to eliminating all existing retail competitors which are producers or refiners, the Act creates substantial barriers to entry for potential new competitors attempting to bring motor fuel into Maryland for sale in the retail market. The direct control permitted through company-operated stations is essential for any marketer to enter a market where it has little or no prior brand recognition. There are 32 non-major oil companies which operate refineries and which do not presently market in Maryland, all of which would be unable to enter the Maryland market. (App. D, p. 130a, E. 401).

Major oil companies, such as Exxon and Phillips, operate retail stations for a variety of purposes, including gaining entry into new geographic markets, dealer training, testing innovations in marketing methods and equipment, and engaging in competition in a more extensive range of automotive repair services and parts, as in the case of Exxon's "Car Care

[8] Subsequent to the trial, Hudson apparently did acquire a refinery and is now subject to the Act.

Centers," which require larger investments than most service stations. (E. 358-360). The Maryland Act's prohibition of such operations impairs the ability of such interstate concerns to compete effectively in the product and service markets involved.

In practical effect, the Maryland Act will restrict the interstate channels through which petroleum products can flow into the State of Maryland and, by the elimination of existing and potential interstate competitors, lessen competition in the State.

REASONS FOR NOTING PROBABLE JURISDICTION

By prohibiting price differentials which do not injure competition and by depriving sellers of the "meeting competition" defense allowed under Section 2(b) of the Robinson-Patman Act, Paragraph (D) of the Maryland Act upsets the delicate balance which Congress established between the competitive philosophy of the Sherman Act and the competitive restraints embodied in the Robinson-Patman Act to protect small businesses, and frustrates the congressional purpose to foster competition. The holding of the Maryland Court of Appeals that Paragraph (D) does not violate the Supremacy Clause of the federal constitution was based on a construction of Section 2 of the Robinson-Patman Act which has been flatly rejected by the federal courts as well as by the Federal Trade Commission and the Department of Justice. Furthermore, Paragraph (D) directly conflicts with Section 2 of the Robinson-Patman Act in that it requires uniform price allowances statewide under circumstances where the necessity to meet competition is confined to a narrower area.

Paragraphs (B) and (C) discriminate against and burden interstate commerce by disrupting the marketing operations of Exxon and Phillips and other major

brand suppliers in which company operated service stations play an essential role. Moreover, these provisions make it difficult or impossible for interstate private brand refiners and suppliers which cannot effectively compete except through stations that they operate themselves, to continue in the Maryland market, and impede the entry into the market of new interstate commpetitors which must operate their own stations in order to gain a foothold.

The questions thus presented under the Supremacy Clause and the Commerce Clause are, we submit, clearly substantial. And their importance far transcends the Maryland market, since there is a nation-wide movement to enact similar statutes in other states. Thus far laws containing restrictions on refiner operation of service stations have been passed by the state legislatures of Delaware and Florida, and by the Council of the District of Columbia; laws requiring uniform prices or allowances have been passed by the legislatures of Delaware, California and Rhode Island, and by the Council of the District of Columbia.[9] During the last four years proposals to prohibit or limit company operation of service stations or to require

[9] The Florida law (Fla. Stat. §526.151), which limits producer or refiner company operations to 3% of the total number of stations in the state, was declared unconstitutional by a state trial court in *Exxon Corp. v. Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Fla. Jan. 23, 1975); no appeal was taken. The Delaware statute (Del. Code, Tit. 6, §§2905-2906 (1976 Cum. Supp.)) is presently under challenge in the state courts. The Rhode Island statute (R. I. Gen. Laws, Tit. 5, Chap. 52) and the California statute (Cal. Bus. & Prof. Code §§21200-21203), which require uniform pricing, are presently being tested in the federal courts; the California case is now before the Ninth Circuit, after the state law was held unconstitutional in the District Court, *Shell Oil Co. v. Younger*, 1976-1 CCH Trade Cases, ¶60,960 (N.D. Calif. 1976), appeal pending No. 76-2784 (9th Cir.). The law adopted by the Council of the District of Columbia is Bill No. 1-333.

uniform statewide pricing or allowances, or both, have been before the legislatures of a total of 33 jurisdictions, including those identified above which have adopted such proposals.[10] The trend in the most recently introduced bills has been toward provisions virtually identical with the Maryland Act. Such bills are likely to receive a strong stimulus if the decision of the Maryland Court of Appeals is allowed to stand.

I.

PARAGRAPH (D) OF THE MARYLAND ACT CONFLICTS WITH THE ROBINSON-PATMAN ACT AND UPSETS THE BALANCE BETWEEN LAWFUL AND UNLAWFUL PRICE DIFFERENTIALS WHICH CONGRESS HAS ESTABLISHED IN THE SHERMAN AND ROBINSON-PATMAN ACTS.

A. *Paragraph D is inconsistent with the Robinson-Patman Act on its face.*

The Maryland statute requires that all discounts be uniform without any consideration for whether a differential in prices would lessen or otherwise impair competition or tend to create a monopoly. Paragraph (D) of the Maryland statute provides that

> "Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

[10] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, and West Virginia. The New Hampshire Supreme Court, in an advisory opinion delivered to the state Senate on June 20, 1977, found that S. B. 75, which is "virtually identical" to the Maryland Act, would be constitutional provided it did not apply "retrospectively to the thirteen retail gasoline stations which are presently operated by suppliers."

The Maryland Court of Appeals held that such "voluntary allowances" are in fact discounts extended by suppliers to certain dealers to enable those dealers to meet competition. Yet under Paragraph (D) such competitive discounts are required to be uniform throughout the State.

This conflicts with the Robinson-Patman Act in two respects. In the first place, the prohibition against non-cost justified price discrimination in Section 2(a) of that act applies only:

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition."

Where price discrimination does not impair competition in any of these ways, it is not unlawful, because Congress recognized that except in special circumstances price differences generally promote competition rather than impair it.

In the second place, the flat Maryland requirement of uniformity ignores the "meeting competition" exception in Section 2(b) of the Robinson-Patman Act, which permits a seller to show "that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." The Maryland statute on its face does not recognize any such exception.

Thus, the Maryland Act is inconsistent with the federal law. The federal law, of course, governs as to all sales subject to the Robinson-Patman Act — and all the sales to Maryland service stations are subject to that statute, as *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), clearly establishes. All motor fuel sold at Maryland service stations comes from refineries outside Maryland and is shipped directly either to the service stations or to bulk storage facilities in Maryland from which it is delivered to the service stations. The

Standard Oil case squarely holds (340 U.S. at 237-238) that sales from bulk storage facilities as well as sales directly from out-of-state refineries to in-state service stations are "in interstate commerce" and "are well within the jurisdictional requirements of the [Robinson-Patman] Act . . . Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character."

The Maryland state-wide uniform allowance requirement also goes beyond what is permitted under the Section 2(b) proviso, the meeting of "individual competitive situations." *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957); *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 517 (1963). This proviso, in allowing a price reduction to meet the lower price of a competitor, does not permit decreasing the price beyond the areas affected by the competitor's lower price. Thus, in *In re Forster Mfg. Co.*, 68 F.T.C. 191, 194-195, 198 (1965), aff'd *sub nom. Forster Mfg. Co. v. Federal Trade Commission*, 361 F.2d 340 (1st Cir. 1966), cert. denied, 385 U.S. 1003 (1967), a 10 percent discount offered uniformly throughout the entire Pittsburgh area, accepted by 17 customers, was held not warranted by proof that a competitor had granted such a discount to three customers. This could not be regarded as action in good faith to meet the competitive offer. See also *Hampton v. Graff Vending Co.*, 478 F.2d 527, 535 (5th Cir.), cert. denied, 414 U.S. 859 (1973) (granting discounts uniformly to large and small buyers throughout areas not justified by competing discount to a large purchaser).

B. The Maryland Court's interpretation of the Robinson-Patman Act does not avoid the conflict between state and federal statutes, and itself is in conflict with the federal interpretation of the federal statute.

In an attempt to minimize the obvious conflict between Paragraph (D) of the Maryland Act and Section 2(b) of the Robinson-Patman Act, the Maryland Court of Appeals adopted an interpretation of the latter Act which is in conflict with the only federal appellate decision on the question as well as with the views of the Federal Trade Commission and of the Department of Justice.

In *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963), this Court held that the Section 2(b) defense could be invoked only when the discriminatory price reduction was a response to a lower price of a seller's own competitor, and did not allow a price reduction by a seller-supplier because the buyer-retailer was faced with price cutting solely at the retail level. This Court left open, however, the case in which the competing retail service station "had received a price cut from its own supplier — presumably a competitor of Sun," which the Court characterized as "a different case, as to which we herein neither express nor intimate any opinion." 371 U.S. at 512, n. 7.

The Seventh Circuit in *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (1972) (per Justice Clark and Judges Swygert and Stevens), finding it necessary to pass upon that question, concluded:

> "We are inclined to the view that the Section 2(b) defense is available to American if the lower price granted its individual dealer is made to meet an equally low price made by a competitor of American to an individual competitor of American's dealer." *Id.* at 1175.

To the same effect is *Bunty v. Shell Oil Co.*, 1972 CCH Trade Cases, ¶74,252. (D.Nev. 1972). See also *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 998 (10th Cir.), cert. denied, 380 U.S. 964 (1965). The court in *Bargain Car Wash* noted that the Federal Trade Commission was of the same view, quoting (466 F.2d at 1176, n. 9) from an FTC report directly on point, which concluded:

> "Consequently, we are of the opinion that a price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer." *FTC Report on Anti-Competitive Practices in the Marketing of Gasoline*, 3 CCH Tr. Reg. Rep. ¶10,373 at 18,245 (1967).

A recent Department of Justice *Report on the Robinson-Patman Act*, p. 94 (1977), expresses the same view.

The Maryland Court of Appeals, while saying that the point is "not without doubt" (App. A, p. 37a), construed the statute differently, relying on the District Court ruling in *Enterprise Industries v. Texas Co.*, 136 F. Supp. 420 (D.Conn. 1955), reversed on other grounds, 240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957). The *Enterprise* case, however, was cited by this Court in the *Sun* opinion (371 U.S. at 512) in support of the decision in that case, immediately after this Court's statement that it was expressing no opinion on the separate question in issue here. Obviously this Court did not regard *Enterprise* as authority on the undecided point.

The interpretation of the federal statute by the Maryland court thus presents a substantial question worthy of review both because the state decision is in conflict with decisions of federal courts and agencies and because the state court's interpretation of the federal statute is erroneous for the reasons indicated in the Federal Trade Commission report cited above. Thus the Maryland court's effort to construe the Robinson-

Patman Act so as to avoid a conflict with Paragraph (D) depends on its own erroneous construction of the federal statute.

C. *Paragraph (D) frustrates federal antitrust policy with respect to pricing practices as established by Congress in the Sherman and Robinson-Patman Acts.*

Paragraph (D) of the Maryland Act requires that allowances made to any dealer in Maryland be made uniformly to all dealers. But this conflicts with the congressional purpose of foster competition expressed in the Sherman and Robinson-Patman Acts:

> "For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, 'The right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy.' Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act." *Report of the Attorney General's National Committee to Study the Antitrust Laws*, p. 181 (1955).

See the language of this Court to the same effect in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 250.[11]

We respectfully submit that Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is, in essence, a modification of the Sherman Act, carefully limited in such a way as not to apply except to transactions which may have the effect of substantially lessening competition. *Automatic Canteen Co. v.*

[11] "There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs."

Federal Trade Commission, 346 U.S. 61 (1953). Both Sections 2(a) and (b), as they now read, spell out this limitation and express the underlying Congressional policy. The Robinson-Patman Act was an attempt to reconcile two conflicting objectives — on the one hand, the encouragement of price competition embodied in the provisions of the Sherman Act, and on the other, the protection of small business enterprises from the impact of discriminatory pricing, first attempted in Section 2 of the Clayton Act. To that end, Section 2 was amended by the Robinson-Patman Act so as to define the extent to which Congress saw fit to limit the free market philosophy of the Sherman Act. For a history of the federal legislation dealing with price competition see the Department of Justice *Report on the Robinson-Patman Act*, pp. 101-148 (1977).

Section 2 of the Robinson-Patman Act thus represents a delicate adjustment of conflicting policies which has been hammered out after years of discussion and debate. The Circuit Court, recognizing that Congress has itself prescribed the accommodation between differing federal policies, cited *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975), where this Court, after holding that a union's collective bargaining agreement was subject to the federal antitrust laws, considered whether the State antitrust law might apply as well. The Court concluded that it could not, saying (at 636):

> "*In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.* [Citation omitted.] State antitrust laws generally have not been subjected to this process of accommodation. If they take

account of labor goals at all, they may represent a totally different balance between labor and antitrust policies. Permitting state antitrust law to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques." (Emphasis added.)

So here, Congress by adopting the Robinson-Patman Act, balanced two conflicting national policies — encouragement of the free market by competitive pricing and protection of small business enterprise from destructive competition. Paragraph (D) is an attempt by the State of Maryland to cast the balance differently by eliminating the limitations which Congress was careful to place on its modification of the Sherman and Clayton Acts. If any such change is desirable, then clearly it is for Congress to make rather than for individual state legislatures to inject their own notions of policy into this sensitive area.

The purpose of Congress to foster price competition has been clear since the enactment of the Sherman Act. By limiting Section 2(a) of the Robinson-Patman Act to acts which might substantially lessen competition and by providing in Section 2(b) that suppliers charged with a violation of Section 2(a) of the Act could defend themselves by showing that a lower price was offered in good faith to meet the lower price of a competitor, Congress made certain that this basic policy should continue without impairment. The effect of the Maryland law is to frustrate that purpose, and this the Supremacy Clause clearly forbids. Cf. *Jones v. Rath Packing Co.*, ___ U.S. ___, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977), which invalidated a state law which by imposing a stricter standard for labeling flour than did the federal Fair Packaging and Labeling Act would

have frustrated the Congressional purpose to facilitate value comparisons among similar products.

II.

PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT, WHICH PROHIBIT PRODUCERS AND REFINERS FROM OPERATING SERVICE STATIONS IN MARYLAND, ARE INVALID UNDER THE COMMERCE CLAUSE.

Paragraphs (B) and (C) of the Maryland Act require *all* refiners or producers of petroleum products to cease operating all company-operated retail service stations in Maryland. The language of the statute is unequivocal: *"The station must be operated by a retail service station dealer."* Since there is no producing or refining in the State of Maryland, the practical effect of the statute is to eliminate altogether the competition of all interstate producers or refiners, both large and small, in the Maryland retail service station market and to require consumers to purchase substantially all their motor fuel requirements from local dealers. The question is whether such a statute imposes an unconstitutional burden on or discriminates against interstate commerce. Stated differently, the question is to what extent may a state exercise its legislative power to protect local retail service station dealers from the competition of producers and refiners which move their product into the state and sell it at retail through their own agents and employees?

A. *The Act imposes a significant burden on interstate commerce.*

In resolving this question, this Court examines the "practical effect" of the challenged statute in order to determine the extent to which it imposes a burden on or discriminates against interstate commerce. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Hunt v. Washington State Apple Advertising Commission*, 45 U.S.L.W. 4746, (U.S. June 20, 1977). This Court has

established that a state law may unconstitutionally impair interstate commerce: by interfering with the "natural functioning of the interstate market either through prohibition or through burdersome regulation," *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976); by regulating interstate commerce where regulation, if necessary, is more appropriate at the national level, *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299 (1851), *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and by discriminating against interstate commerce by protecting local businesses from foreign competition, *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

The practical effect of the Maryland Act in requiring the use of independent dealers to retail gasoline, to the exclusion of producers and refiners, is to deprive consumers of the benefits of competition from aggressive interstate competitors and to create a protected enclave for local independent dealers against competition from without the State. The Court of Appeals so acknowledged:

> "The State's expert witness conceded that the Act, by excluding certain partially integrated marketers, could in some respects be anti-competitive . . . ." (App. A, p. 15a).

The Maryland Act creates this environment insulated from competition in four distinct ways.

First, the Act, as noted above, reduces competition by barring Exxon, Phillips and other producers and refiners, now operating approximately 209 retail stations, from continuing to compete in the retail market in Maryland through company-operated stations.

Second, the Act makes it difficult for producers or refiners not currently distributing their products in the Maryland market ever to enter that market. Exxon's experience in entering the Florida market in 1962

illustrates this point. "This was a market that we'd never been in prior to 1962. We were unknown in the market at that time. We had no brand image. We were unable to attract dealers. Stores were unable to provide sufficient income to the dealer so Exxon elected to operate those stores on a company operated basis until such time we could build a volume through proper operation to the point that the dealer could make a living and at that time the stores were leased to dealers. . . . This was some five or six years later. . . . I would think less than five percent are company operated at this time." (E. 359).

If Exxon was unable to enter a new market without operating its own stations, marketers with less resources would have at least the same difficulty. Thus, there is every reason to believe, as the trial court found, that the 32 of the 37 partially integrated private brand marketers presently not selling their products in Maryland would be kept out by the new law. (App. D, p. 130a).

Third, the Maryland Act makes it economically prohibitive for integrated private brand marketers, including plaintiffs Petroleum Marketing, Ashland and Kayo, to continue marketing their products in Maryland. The testimony in this case established beyond doubt that marketers which sell brands of gasoline with little consumer recognition in a given market must retail their product at prices lower than those at which advertised brands are sold. (E. 488-489). They have tried dealer operations and found they cannot compete effectively because, *inter alia*, under the antitrust laws they cannot control the price of the products sold. (E. 453, 488-489, 499). Company-operated stations are the only viable marketing avenue for such marketers. Ashland's experience illustrates this point. Near its home territory in Ashland, Kentucky, it markets primarily through independent dealers because of

brand acceptance, while in markets distant from its home territory, such as Maryland, lack of such brand acceptance dictates that it market exclusively through company operated outlets. (E. 488-489).

Fourth, the Maryland Act inhibits private brand marketers of gasoline which are not currently producers or refiners from integrating backwards into refining or production of petroleum products or, alternatively, drives them out of the Maryland market if they do choose to integrate backwards. At the trial, Mary Hudson, president of Hudson Oil Company, which sells in 36 states exclusively through company-operated outlets (over 300 stations nationwide, including 5 in Maryland), testified that she was planning construction or purchase of a refinery. While her acquisition of a refinery would strengthen her competitive posture, she stated that if the Maryland Act is upheld, "we would have to dispose of our stations here in Maryland and, of course, we do not want to do that." (E. 500).

The total effect of the Maryland Act is to erect "an economic barrier protecting a major local industry against competition from without the State." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). Even if the provisions of the Maryland Act do not amount to a total exclusion of private brand competitors from the Maryland market, they still constitute a substantial burden on interstate commerce, since the practical effect is, at the very least, to increase operating costs, impair efficiency, and hamper the ability of producers and refiners of petroleum products to compete in interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 781-782 (1945); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922). "The common

thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976); cf. *Hunt v. Washington State Apple Advertising Commission*, 45 U.S.L.W. 4746, 4751 (U.S. June 20, 1977).

Ironically, the burden of the statute falls most heavily on independent refiners and "non-major" oil companies. (E. 70-71). These companies furnish vigorous price competition, and their practical exclusion from the Maryland market will bear heavily on consumers. Appellants are also adversely affected by the elimination of their company-operated stations, which mode of operation is an important part of their marketing format.[12] Moreover, they are fully aware of the fact that if the Maryland Act is upheld, there is every likelihood that similar statutes will be enacted in other states. See pp. 12-13, *supra*. Furthermore, the prospect that each state legislature may adopt its own variations on the Maryland law is a chilling one, with drastic implications for any company's national marketing structure.

This Court looks particularly askance at state legislation which favors local business as against outsiders. *Nippert v. Richmond*, 327 U.S. 416 (1946); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Hunt v. Washington State Apple Advertising Commission*, 45 U.S.L.W. 4746, (U.S. June 20, 1977). And such favoritism is not negated because the statute is not "discriminatory on [its] face", *Nippert* at 431.

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[12] Appellants' company-operated stations are used for various purposes, including, *inter alia*, entering new markets, training independent dealers, testing and developing marketing and equipment innovations for possible future use by independent dealers, and providing comprehensive auto repair services. (E. 136, 360).

In *Nippert*, this Court, in holding unconstitutional Richmond's tax on solicitors, recognized that the tax "may strike as heavily upon some Virginia solicitors . . . as it does upon others who come" from other states (327 U.S. at 432). In *Dean Milk*, 340 U.S. at 354, n. 4, this Court, in holding unconstitutional a local ordinance which required milk pasteurizers to be located within five miles of the City of Madison, Wisconsin, again recognized that it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." See also *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891). Thus, even though the Maryland law would apply to the operation of service stations in Maryland operated by Maryland refiners, if there were any, this does not mean that there is no discrimination against or burden upon interstate commerce within the meaning of the decisions of this Court.

The Maryland court's view that the policy of the Commerce Clause would not be impaired in the absence of a physical impediment to entry is thus too narrow. The principle that a state may not impose economic barriers which favor local businesses is not limited to the situation where a product is physically barred from entry into the state, as was the milk in the *Dean* case. The drummer cases, of which *Nippert* is perhaps the most recent, demonstrate that state or local laws which give a competitive advantage to local merchants over out-of-state competitors are invalid even though there is no impediment to the physical delivery of the product into the state and no reason to believe that the law will lessen the total quantity of the products involved which will be shipped into the state. As the cases cited above demonstrate, this Court has held that the Commerce Clause is violated if interstate businesses are handicapped in competing with local traders, even though the

latter might (in the absence of other competition) be able to import enough goods to meet the entire demand.

Here the obvious and intended effect was to give the local dealers a substantial advantage. The twice repeated statement added to Paragraphs (B) and (C) of the Maryland Act in 1975 that

> "The station must be operated by a retail service station dealer"

demonstrates on its face that a principal object of the Act was to protect local dealers against competition from refiners all of whom are outsiders. The Circuit Court found that it was "designed to benefit one class of merchants to the detriment of another" (App. D, p. 131a) — and this will be its effect, as has been shown above. This Court has stated, however, that the "protection of local economic interests" does not justify an interference with interstate trade. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. at 531.

The Maryland Court of Appeals expressed the view that the Maryland Act was regulating a "wholly intrastate activity." (App. A, p. 18a). On the contrary, the sale of petroleum products which are transported into a state has been regulated by Congress not only under the antitrust laws (see Point I, *supra*, at 14 and *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951); *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963)) but also in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.*, *inter alia*. In any event, where a state law has the effect of favoring local dealers over interstate competitors, an impermissible barrier to interstate commerce may be created even though its immediate impact may be upon conduct within the state. E.g., *Hood v. Du Mond, supra* (licensing milk receiving stations); *Nippert, supra* (tax on method of selling in state).

B. *The burdens which Paragraphs (B) and (C) impose on interstate commerce are not justified by benefits to legitimate local interests incapable of being achieved by less drastic means.*

In determining the constitutionality of a state law when challenged as a burden on interstate commerce, the Court applies the three-pronged balancing test stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and recently reaffirmed in *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976):

> "[1] the extent of the burden that will be tolerated will . . . depend on the [2] nature of the local interest involved, and on [3] whether it could be promoted as well with a lesser impact on interstate activities."

The burdensome effects of the Maryland Act upon interstate commerce have been described above. *Supra* at 22-25. In order to justify the burdens on interstate commerce created by the Maryland law, there must be a showing of sufficient legitimate local interest. Less weight is given to the local interest in the balancing process when the law, as here, involves matters purely economic in nature, which are closer to the concerns which the Commerce Clause committed to Congress, rather than those concerning health, safety or fraud. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. at 531, *supra; Pike v. Bruce Church, Inc.*, 397 U.S. at 143, *supra; Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960).

And even less weight should be given to the alleged local interest when, as here, the same public interest can be adequately safeguarded by measures much less drastic than prohibiting all refiner-operated service stations, including those so operated before the law was passed. "Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of 'accommodation' of conflicting local and national interests, since any

'realistic' judgment' whether a given state action 'unreasonably' trespasses upon national interests must, of course, consider the 'consequences to the state if its action were disallowed.'" *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373 (1976). The Maryland court completely ignored the existence of less burdensome alternative means of accomplishing the State's objectives.

The conclusion of the Court of Appeals that there was a legitimate local interest is based on two findings: (1) that during the period of the gasoline shortage in 1973, some company-operated stations received greater allocations of gasoline than did dealer-operated stations, forcing many dealers out of business, and (2) that there was evidence that certain oil companies intended to increase the number of company-operated stations, from which the General Assembly might have concluded that this trend "if allowed to continue" could substantially decrease competition and lead to the control of that market by a few major oil companies. (App. A, p. 19a). These findings of the Court of Appeals, however, must be considered in the light of the Circuit Court's finding, and the State's concession on appeal, that retail marketing of petroleum products in Maryland is at present "highly competitive." (App. D, p. 99a, State's Brief at 7). Particularly under these conditions, neither finding justifies the drastic provisions of Paragraphs (B) and (C) of the Act.

Not only are less Draconian remedies available, they have already been enacted. The federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.*, and regulations promulgated thereunder (10 C.F.R. Parts 210-211) provide for the allocation of supplies on a fair and equitable basis.[13] Moreover, Paragraph (F) of

[13] The Energy Policy and Conservation Act, §461, P.L. 94-163 (1975), has extended the operation of the Act through September 30, 1981.

the Maryland Act here involved also provides for uniform and equitable allocations in "periods of shortage." The court below in this case construed those standards as having the same meaning as the federal. (App. A, pp. 29a-32a). Certainly to require all refiners operating service stations in Maryland to stop operating them is an unnecessarily severe method of dealing with the allocation problem.

So, likewise, there are equally effective and much less drastic means of halting any perceived trend toward the conversion of dealer-operated stations to company operation. Maryland has already adopted legislation prohibiting arbitrary terminations of dealer operations. Maryland Gasoline Products Marketing Act, Md. Anno. Code (1975), Comm. L. Art. §11-304(c). See App. F, pp. 155a-161a for the provisions of this statute. Insofar as anticompetitive conduct is said to arise from the presence of company-operated stations — of which there is no evidence in this record — Maryland law parallels the federal antitrust laws; both proscribe retail price maintenance schemes, price discrimination and predatory pricing which affects competition. Cf. Maryland Antitrust Act, Md. Anno. Code (1975), Comm. L. Art. §11-201 *et seq.*; Maryland Unfair Sales Act, Md. Anno. Code (1975), Comm. L. Art. §11-401 *et seq.* The federal antitrust laws were recently amended to permit the attorney general of any state to bring a *parens patriae* suit on behalf of the residents of the state for violations of the Sherman Act. 15 U.S.C. §15c, 90 Stat. 1394 (1976).

In addition, Section 5 of the Federal Trade Commission Act, which now extends to unfair methods of competition and unfair or deceptive acts or practices "in or *affecting* interstate commerce" (15 U.S.C. §45, as amended, Jan. 4, 1975, 88 Stat. 2200), has recently been applied to alleged unfair provisions in retail service station transactions. *Phillips Petroleum Co.*, 84 F.T.C.

1666 (1974) (consent order for settlement purposes only with no admission or finding of violation); *Standard Oil Co. (Ohio)*, Dkt. 8910, CCH Trade Reg. Rep. ¶20,134 (proposed complaint, 1972) ¶20,208 (complaint issued, 1973). And the Commission was recently granted increased enforcement power by Congress to bring civil actions against persons who engage in acts which the Commission has determined to be unfair or deceptive and for which it has then issued final cease and desist orders, whether or not such persons were subject to the prior orders. 15 U.S.C. §45(m((1)(B), 88 Stat. 2200 (1975).

The possibility that the consequences which Maryland fears will occur is, we submit, not substantial enough, in view of the less drastic available alternative means of obtaining the same results, to outweigh the immediate substantial impairment of interstate competition and the interference with the interstate market which would result from the enforcement of the Maryland law if it is allowed to stand.

CONCLUSION

For the reasons set forth above, we submit that the Court should note probable jurisdiction in these cases.

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Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-10

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY, *Appellants*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

CONTINENTAL OIL COMPANY AND
KAYO OIL COMPANY, *Appellants*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

SHELL OIL COMPANY, *Appellant*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

GULF OIL CORPORATION, *Appellant*,
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees*,

No. _____

ASHLAND OIL, INC., COMMONWEALTH OIL
REFINING COMPANY, INC., AND PETROLEUM
MARKETING CORPORATION, *Appellants*,
v.
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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

(See inside cover for Counsel)

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APPENDIX A

In the Court of Appeals of Maryland

No. 10

September Term, 1976

Governor of the State of Maryland, et al.

v.

Exxon Corporation, et al.

Argued before Murphy, C. J., and Smith, Digges, Levine and Eldridge, JJ., and James C. Morton, Jr., and Ridgely P. Melvin, Jr., Associate Judges of the Court of Special Appeals, specially assigned.

Decided February 18, 1977

ELDRIDGE, J.:

In this case we are presented with several questions concerning the constitutionality of Chapter 854 of the Laws of Maryland of 1974, as amended by Chapter 608 of the Laws of 1975, and codified in Maryland Code (1957, 1972 Repl. Vol., 1976 Cum. Supp.), Art. 56, § 157E. These chapters added the following provisions to the Motor Fuel Inspection Law (italicized portions are those added by Chapter 608 of the Laws of 1975):

> "(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service

station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

"(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

"(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

"(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

"(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

"(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

"(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts."

In addition to the authority granted in Paragraphs G and H to promulgate rules and regulations for the temporary operation of retail service stations by producers and refiners, and to permit reasonable exceptions to the specified divestiture dates, *see* 2 Maryland Register 228, the Comptroller has the power generally to promulgate rules and regulations for the administration of the Motor Fuel Inspection Law, Art. 56, § 157B(a). Additionally, the Comptroller may direct those marketing petroleum products in violation of the Motor Fuel Inspection Law or regulations adopted pursuant thereto to cease such violations. If the violations should continue, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit courts for an injunction against the continuance of the violations, Art. 56, § 157B(b). There are also criminal penalties for violation of the Motor Fuel Inspection Law, Art. 56, § 157K.

Chapter 854 was signed into law on May 31, 1974, effective July 1, 1974. On June 17, 1974, Exxon Corporation instituted an action in the Circuit Court for Anne Arundel County seeking a declaratory judgment pursuant to the Maryland Uniform Declaratory Judgments Act, Code (1974), § 3-401 *et seq.* of the Courts and Judicial Proceedings Article, that Chapter 854 be declared unconstitutional and invalid. Additionally, Exxon sought injunctive relief prohibiting enforcement of Ch. 854. Defendants in the action were the Governor of Maryland, the Attorney General of Maryland, and the Comptroller of the Treasury of Maryland.

Thereafter Continental Oil Company and its subsidiary Kayo Oil Company, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation, and Ashland Oil, Inc., filed substantially similar actions, and all actions were consolidated for trial. The plaintiffs either directly or through their subsidiaries are all engaged in the direct retail marketing of petroleum products in the state of Maryland. All, with the exception of Common-

wealth and Ashland, are large multi-national, fully integrated oil companies engaged in the production, refining, transportation and marketing of petroleum products. Commonwealth is a refiner dependent solely upon foreign crude oil supplies, and markets gasoline through its wholly owned subsidiary, Petroleum Marketing Corporation. Ashland is primarily a refiner and marketer of petroleum products, but does engage in some limited production of crude oil.[1] Additionally, four independent retail dealers of Crown Central Petroleum Corporation were permitted to appear in support of the Act as *amici curiae.*

The substance of the oil companies' attack on the validity of Chapter 854 is fairly represented by the allegations in Exxon's complaint. The Act was challenged on several grounds. Exxon alleged that the Act did not bear a real and substantial relationship to the health, safety, morals or welfare of the people of Maryland and thus denied it due process of law in violation of Art. 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution; that the Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause, Art. 1, § 8 of the United States Constitution; that the Act constituted a taking of its investment in retail service stations without just compensation in violation of Art. III, § 40 of the Maryland Constitution and the just compensation clause of the Fifth Amendment to the United States Constitution; that the Act, in prohibiting only producers and refiners of petroleum products from engaging in the retail sale of gasoline, denied them the equal protection of the laws in violation of Art. 23 and the Fourteenth Amendment; and that the provisions of the Act authorizing the Comptroller to issue rules and regulations permitting exceptions to the divestiture dates and allowing temporary operation of retail service stations by producers and refiners failed to set forth

[1] The plaintiffs are hereafter sometimes referred to as "the oil companies."

any standards to guide the Comptroller, and thus constituted an unlawful delegation of legislative authority in violation of Art. 8 of the Maryland Declaration of Rights. Additionally, it was alleged that the provision of the Act providing for equitable allocation of petroleum products was in conflict with the Federal Emergency Petroleum Allocation Act of 1975, 15 U.S.C. 751 *et seq.*, that the provision of the Act requiring uniform "voluntary allowances" was in conflict with the Robinson-Patman Act, 15 U.S.C. 13, and that, therefore, both provisions were invalid under the Supremacy Clause of Art. VI of the United States Constitution. Finally, it was alleged that certain provisions of the Act are void for vagueness.

On May 5, 1975, the circuit court, after a pre-trial conference, entered an order prohibiting the defendants from enforcing the provisions of Chapter 854 against the plaintiffs while the cases were pending. Plaintiffs were ordered not to open any new retail service stations operated with company personnel nor to convert existing retail service stations to direct company operation without first notifying defendants of their intention to do so and reasons therefor. Motions for partial summary judgment were then filed by Exxon, Shell and Gulf with respect to those provisions of the Act requiring uniform "voluntary allowances" (Paragraph D) and uniform allocation of products during periods of shortages (Paragraph F) on the ground that both were in conflict with federal law. The motion was granted with respect to Paragraph D on October 14, 1975. The case then proceeded to trial on the remaining issues.

Extensive evidence was presented at trial relating to the nature of the retail marketing of gasoline and petroleum products in Maryland and the alleged effect that the Act would have on the industry. Oil company officials, either by live testimony or by affidavits, testified that the Act would have an adverse effect insofar as the consumer is concerned. They testified that by prohibiting producers and refiners from

operating retail service stations, producers and refiners would lose the necessary control over operations to guage accurately consumer preferences for such innovative features as self-service stations, car wash facilities, and total car care service facilities offering a national guarantee, thus allegedly depriving the consumers in Maryland of the wide variety of automotive services now available. They also testified that company operated stations[2] serve as training centers for independent dealers, insuring that consumers will be served by efficient, courteous and knowledgeable personnel at non-company operated stations. Additionally, executives of the three companies who market solely through company operated stations asserted that their type of low price-high volume stations could not be economically run with non-company personnel, and that, in all probability, they would be forced to withdraw from the Maryland market if the Act were to become effective. Four economists, qualified as expert witnesses, also testified on behalf of the oil companies in opposition to the Act. In general, they believed the Act would reduce competition and would therefore be detrimental to the interests of the consumer. This reduction of competition would occur because, in their view, the Act would inhibit new competitors from entering the market, force existing, highly aggressive independent marketers such as Petroleum Marketing Corporation and Commonwealth out of the market, and would also limit the variety of auxiliary services available to consumers by discouraging tests of innovative marketing techniques.

The State presented as its expert witness Dr. James M. Patterson, a professor of Business Administration, who is the author of two books on gasoline marketing.

[2] As used in this opinion, "company operated station" refers to a retail service station operated directly by employees of a refiner or producer of petroleum products, or a subsidiary of a refiner or producer. It does not refer to retail service stations operated by a company engaged only in the marketing of petroleum products.

He testified that in his opinion the Act would actually enhance competition in gasoline marketing. Elimination of company operated stations would preserve "intertype competition," which he described as competition among the various types of competitors in the marketplace such as private brand, non-integrated, and major brand marketers. On the other hand, increased company operation of service stations would, in his view, enable major integrated oil companies to use increased profits, resulting from the recent increases in crude oil prices, to drive various "price competitors" from the market as well as divert available gasoline supplies from independent, unbranded marketers. Such actions would, eventually, reduce overall competition in gasoline marketing. Evidence was also adduced by the State to show that several partially or fully integrated oil companies planned either to increase the number of company operated stations or to convert all stations to company operations. This, the State argued, tended to support Dr. Patterson's opinion that the major oil companies would seek to reduce competition among gasoline marketers by reducing the number of competitors.

Significant evidence concerning the history and purpose of Chapter 854 was also presented. On June 13, 1973, the Governor requested that the Comptroller conduct a study of gasoline retailing in Maryland. The purpose of the study was to determine if the then existing shortage of fuel was real or contrived, and also to determine whether company owned and operated service stations were receiving larger allocations of gasoline than dealer operated or independent stations. This request was motivated by the large number of complaints received by the Governor's office concerning the availability of gasoline, and the fact that some brands of gasoline appeared to be available in unlimited quantities while other brands were available only in limited quantities. On June 29, 1973, questionnaires prepared by the Gasoline Tax Division of the Comptroller's office were sent to registered gasoline service

stations in the state. The results of this survey were tabulated, and a written analysis of the survey entitled "Results and Analysis of Service Station Dealers Questionnaire" was submitted to the Governor on September 6, 1973.

The results of the survey were tabulated according to the type of service station responding to the questionnaire. Service stations were divided into four categories: retail service stations leased to a dealer by a major oil company; independently owned stations operated under a major brand; unbranded stations; and company operated stations. According to the survey, company operated stations were "either unrestricted in their purchases or were allocated 100% of their needs." Independently owned stations operated under a major brand name, however, were characterized as the "most abused" category, with a wide fluctuation in the percentage allocation based upon prior year purchases. According to the report, many were forced to close or restrict hours of operation because of decreased product availability. Unbranded stations and major stations leased to dealers fared better than independently owned stations, but both categories experienced reduced allocations from suppliers. The report concluded that company operated stations "were virtually unaffected insofar as gasoline availability was concerned" while both branded and unbranded independents experienced "the greatest difficulty in obtaining gasoline" and the "greatest cost per gallon increase."

Subsequent to submission of the report to the Governor, and after several discussions with the Governor, the Comptroller's office forwarded proposed legislation to the Governor on January 7, 1974, designed to correct the inequities in the distribution and pricing of gasoline reflected by the survey. Bills identical to the proposed legislation drafted by the Comptroller's office were introduced in both houses of the General Assembly.

The bills were then referred to the Senate Economic Affairs Committee and the House Economic Matters Committee, and both committees held public hearings on the bills. Representatives of the major oil companies appeared at both hearings in opposition to the proposed legislation. They denied allegations that the shortage of gasoline was contrived and that company operation of service stations promoted inequitable product allocation, cancellation of dealer leases and control of retail prices. The oil company representatives believed that implementation of the legislation would decrease competition and would therefore be detrimental to the interests of Maryland consumers. Proponents of the bills also appeared at the hearings, including a representative of the Greater Washington/Maryland Service Station Association. He cited several recent examples of cancellations of dealer leases and conversions to company operation, as well as reduced allocation of products to dealers, to support his allegations that the major oil companies intended to control and monopolize retail marketing of gasoline by reducing and eliminating competition from independent dealers. Furthermore, he referred to a congressional report on the federal Petroleum Allocation Act expressing a similar concern over increased involvement of major oil companies in the retail marketing of gasoline. *See* Conference Report No. 93-628, 93d Cong., 1st Sess., *reprinted in* [1973] U. S. Code Cong. & Ad. News, 2688, 2707. The Comptroller also appeared in support of the Act, and submitted copies of his report and analysis of the dealer questionnaires to both committees.

The House and Senate Committees reported favorably on the bills. Both bills were amended by the removal of a prohibition against wholesalers operating retail service stations and by the addition of the provision authorizing the Comptroller to adopt rules and regulations permitting temporary operation of stations by producers and refiners. In addition, the Senate bill was amended so as to authorize the Comptroller to allow reasonable exceptions to the

divestiture dates specified in the bill. Both bills were then passed during the 1974 session of the General Assembly and submitted to the Governor for his approval. The Governor held a special veto hearing on the bills at which both proponents and opponents again testified. Thereafter, the House bill was vetoed, Laws of Maryland of 1974, pp. 3137-3138, and the Senate bill was signed into law by the Governor, becoming Chapter 854 of the Laws of Maryland of 1974.

At the conclusion of the trial, the circuit court filed a decree declaring that Chapter 854 of the Laws of 1974 and Chapter 608 of the Laws of 1975 were unconstitutional and void. An injunction was also filed, enjoining the defendants from enforcing the statutes. Although the circuit court's holding was based primarily on the ground that the Act violated the due process clauses, the court also indicated that the Act was invalid for several other reasons raised by the oil companies. The defendants appealed from the judgment to the Court of Special Appeals, and we issued a writ of certiorari prior to a decision by the Court of Special Appeals.

On this appeal, the oil companies reiterate their challenge to the Act on all of the constitutional grounds raised below.

(1) *Due Process*

The oil companies' main attack upon the statute is on so-called "substantive due process" grounds. They contend, as the trial court held, that the divestiture provisions of the Act (Paragraphs B and C) are an invalid exercise of the State's police power in violation of the Due Process Clause of the Fourteenth Amendment and Art. 23 of the Maryland Declaration of Rights.[3]

This Court has on numerous occasions in recent years discussed the standards applicable when the constitu-

[3] Art. 23 of the Maryland Declaration of Rights provides that "[n]o man ought to be . . . deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." As we pointed out last term in Westchester West

tionality of economic regulatory legislation is challenged on substantive due process grounds. *Westchester West No. 2 v. Mont. Co.*, 276 Md. 448, 348 A.2d 856 (1975); *Steuart Petroleum Co. v. Board*, 276 Md. 435, 347 A.2d 854 (1975); Bowie Inn v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975); *Md. St. Bd. of Barber Ex. v. Kuhn*, 270 Md. 496, 312 A.2d 216 (1973); *Md. Bd. of Pharmacy v. Sav-A-Lot*, 270 Md. 108, 311 A.2d 242 (1973); *Salisbury Beauty Schools v. St. Bd.*, 268 Md. 32, 300 A.2d 367 (1973); *Potomac Sand & Gravel v. Governor*, 266 Md. 358, 293 A.2d 421, *cert. denied*, 409 U.S. 1040, 93 S. Ct. 525, 34 L. Ed. 2d 490 (1972); *Brooks v. State Board*, 233 Md. 98, 195 A.2d 728 (1963); *Allied American Co. v. Comm'r.*, 219 Md. 607, 150 A.2d 421 (1959). Recent Supreme Court decisions in this area are *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963); and *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

Last term, in *Westchester West No. 2 v. Mont. Co., supra*, 276 Md. at 454-455, in holding that a Montgomery County rent control law did not violate the Due Process Clause of the Fourteenth Amendment or Art. 23 of the Maryland Declaration of Rights, we discussed the function of the courts in reviewing regulatory legislation alleged to be violative of the due process clauses. We emphasized that the function of the courts in this area is "very limited," and went on to say (276 Md. at 455):

> "Unless the exercise of the police power by the Legislature is shown to be arbitrary, oppressive or

No. 2 v. Mont. Co., 276 Md. 448, 465 n. 11, 348 A.2d 856, 866 (1975),

> "This Court has long equated Art. 23 with the Due Process Clause of the Fourteenth Amendment. *E.g.*, Bowie Inn v. City of Bowie, *supra*, 274 Md. at 235 n. 1; In re Easton, 214 Md. 176, 187, 133 A.2d 441 (1957); Solyuca v. Ryan & Reilly Co., 131 Md. 265, 270, 101 A. 710 (1917); Pub. S. Com. v. N. C. Rwy. Co., 122 Md. 355, 386, 90 A. 105 (1914); Baltimore Belt R.R. v. Baltzell, 75 Md. 94, 99, 23 A. 74 (1891)."

unreasonable, the courts will not interfere with it. *Bowie Inn v. City of Bowie, supra,* 274 Md. at 236; *Salisbury Beauty Schools v. St. Bd., supra,* 268 Md. at 48. Moreover, the wisdom or expediency of a law adopted in the exercise of the police power of a state is not subject to judicial review, and such a statute will not be held void if there are any considerations relating to the public welfare by which it can be supported. *Bowie Inn v. City of Bowie, supra,* 274 Md. at 236; *Sav-A-Lot, supra,* 270 Md. at 106; *Salisbury Beauty Schools v. St. Bd., supra,* 268 Md. at 48."

Judicial deference to legislative judgment is appropriate when reviewing legislation dealing with economic problems. In *Ferguson v. Skrupa, supra,* in holding constitutional a statute permitting only attorneys to engage in the business of debt adjustment, the Supreme Court said (372 U.S. at 730-732, 83 S. Ct. at 1031-1032):

"We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'

* * * * * *

". . . We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws,

regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' "

And as was said in *Williamson v. Lee Optical Co., supra,* 348 U.S. at 488, 75 S. Ct. at 464, quoted by us recently in *Steuart Petroleum Co. v. Board, supra,* 276 Md. at 447, the wisdom of the Act is not for us to judge as "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

A statute enacted by the Legislature in the exercise of the police power "is presumed to be valid and one attacking its validity has the burden of affirmatively and clearly establishing its invalidity." *Salisbury Beauty Schools v. St. Bd., supra,* 268 Md. at 48. While the oil companies have presented evidence questioning the wisdom of the Act and perhaps raising doubts as to the efficacy of the Act in achieving its purpose of preserving a highly competitive retail gasoline market, they have failed to meet their burden. It has not been demonstrated that the Act is "arbitrary" or that there are no "considerations relating to the public welfare by which it can be supported." Quite to the contrary, the history of Chapter 854 establishes that it was the product of a careful and deliberate process involving a study of retail marketing of gasoline products in Maryland as well as three public hearings at which opponents of the Act including some of those now challenging it, were able to present their objections to both the Legislature and the Governor.

The oil companies do not contend that the Legislature may not under any circumstances limit the nature of business which they may conduct in the state. *See, e.g., Daniel v. Family Ins. Co.,* 336 U.S. 220, 69 S. Ct. 550, 93 L. Ed. 632, 10 A.L.R.2d 945 (1949); *Asbury Hospital v. Cass County,* 326 U.S. 207, 66 S. Ct. 61, 90 L. Ed. 6 (1945); *Brooks v. State Board, supra.* Rather, the oil companies ask us to review the evidence concerning the

possible effect of the Act and to substitute our judgment for that of the Legislature.

In *Bowie Inn v. City of Bowie, supra,* we were presented with a similar situation. There, the city council of Bowie, in order to control a problem of roadside litter, enacted an ordinance, after a public hearing, requiring a deposit to be collected on all soft drink and malt beverage containers which would be refunded upon return of the container. There, as here, those challenging the ordinance offered evidence that the ordinance would not be effective in achieving its stated goal, and asked the Court to decide from such evidence that the city council acted arbitrarily and unreasonably. We rejected this contention in light of evidence presented to the city council that there was a need for litter control and in view of the fact that the means adopted by the city council could conceivably be effective in reducing the problem of litter.

Here the Legislature was presented with evidence that refiners and producers were favoring company operated stations in the allocation of gasoline. The Comptroller's report showed that, because of the inability to obtain adequate supplies of gasoline, some service station dealers were forced to close. Evidence was also presented that many dealer operated stations were being converted to company operation. The Legislature could reasonably conclude that control of the retail gasoline market by producers and refiners would decrease competition and that the continued existence of independent retail dealers was necessary to preserve competition.[4] Exclusion of producers and

[4] The oil companies contend that the effect of the Act will be to reduce competition by excluding from the market certain aggressive competitors. The Legislature, however, has determined that competition from producers and refiners could ultimately result in the destruction of a competitive retail gasoline market. In Blum v. Engelman, 190 Md. 109, 115, 57 A.2d 421 (1948), in upholding the validity of the Maryland Unfair Sales Act, this Court noted that certain competitive practices may be harmful to the public welfare, and that the Legislature is "free to adopt whatever economic

refiners may conceivably be a reasonable means of preserving competition and preventing monopolistic control of gasoline marketing by a few large oil companies. Divestiture of retail gasoline stations by producers and refiners as a means of preserving competition in retail gasoline marketing recently has been recommended by at least two congressional committees. *See* H. R. Rep. No. 94-1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 94-1005, 94th Cong., 2d Sess. (1976). Indeed, in *Federal Trade Comm'n v. Sun Oil Co.,* 371 U.S. 505, 528, 83 S. Ct. 358, 371, 9 L. Ed. 2d 466 (1963), the Supreme Court recognized that elimination of retail service station dealers through forward vertical integration may be an "evil" requiring legislative action.

The oil companies have presented evidence which casts some doubt on the wisdom of the Act. The State's expert witness conceded that the Act, by excluding certain partially integrated marketers, could in some respects be anti-competitive, although he believed that it would, on the whole, promote competition. However, as discussed above, the courts may not substitute their judgment for that of the Legislature. Especially where reviewing legislation dealing with a serious problem in a new and untried fashion, the courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem. Legislation prohibiting operation of retail service stations by producers and refiners of petroleum has been proposed in several states as well as in Congress but only recently has been enacted by several states. *See* Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment,* 28 Vand. L. Rev. 1277 (1975). As of now there has been no evidence by which to judge the effects of these statutes and predictions as to the effects of the Act are at best

policy may reasonably be deemed to promote public welfare, whether by promoting free competition by statutes aimed at monopolies or by curbing harmful competition . . . ." *See also* Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176 (1939), which upheld the Maryland Fair Trade Act.

speculative. In *Bowie Inn v. City of Bowie, supra,* we commented on the importance of permitting new legislation to be tested, as follows (274 Md. at 237-238):

> "Here, invalidation of the ordinance would deprive the City Council of Bowie and any other legislative body contemplating such a law of any opportunity to discover whether the ordinance will be good, bad or indifferent in its results. The words of Mr. Justice Frankfurter in *American Federation of Labor v. American Sash and Door Co.,* 335 U.S. 538, 553, 69 S. Ct. 258, 265, 93 L. Ed. 222, 6 A.L.R.2d 481 (1949) (concurring opinion), are particularly appropriate:
>
> > 'Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophesy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests — the people.'"

For these reasons, we hold that the court below erred in holding that the Act was violative of the Due Process Clause of the Fourteenth Amendment or Art. 23 of the Maryland Declaration of Rights.

(2) *Commerce Clause*

The oil companies also contend that the divestiture provisions of the Act are invalid under the Commerce Clause, Art. I, § 8 of the United States Constitution. The companies argue that the purpose of the Act is to protect local retail service station operators from competition by those engaged in interstate commerce. To accomplish this purpose, it is contended that the Act

denies out-of-state competitors access to local retail gasoline markets and thus discriminates against interstate commerce. In support of this contention, the oil companies rely on *H. P. Hood & Sons v. DuMond,* 336 U.S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949).

The Supreme Court has on several occasions struck down state statutes regulating the production and sale of a commodity as violative of the Commerce Clause where it has found that the purpose and effect of the statute was solely to protect local economic interests by discriminating against interstate commerce. In *Baldwin v. G.A.F. Seelig,* 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55 (1935), a New York statute establishing a minimum price to be paid out-of-state producers of milk to be sold locally was held unconstitutional. The Court found that the practical effect of the statute was to protect local producers from competition by excluding milk produced in other states from the New York market. Another New York statute was held unconstitutional in *H. P. Hood & Sons v. DuMond, supra.* There the statute granted the State Commissioner of Agriculture the authority to deny milk processors a license to operate milk receiving and processing plants if it were found that such plants would lead to "destructive competition in a market already adequately served." The petitioner, a milk processor who operated several receiving and processing plants in New York for milk to be sold in Massachusetts, was denied a license to operate a new facility. The Court determined that a license was denied to prevent exportation of milk from New York during a time when there was a temporary shortage of milk in the area in which the plant was to be located. Relying on the principle that the states may not "advance their own commercial interests by curtailing the movement of articles of commerce," the Court held that the statute as applied violated the Commerce Clause and was therefore unconstitutional. 366 U.S. at 535.

Similarly, in *Dean Milk Co. v. Madison,* 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951), the Court held

unconstitutional a municipal ordinance which prohibited the sale of pastuerized milk in the city of Madison, Wisconsin, unless processed and bottled within a five mile radius of the center of town and which required that the source of supply of all milk be inspected by city officials, but which imposed a twenty-five mile limit on the area in which inspectors would travel. The petitioner was an Illinois corporation whose milk supply and processing plants were outside of the geographic limitations imposed by the ordinance. While recognizing that the city had a legitimate interest in protecting the health of its citizens by insuring that only wholesome milk be sold within its boundaries, the Court found that the ordinance, as in *Baldwin v. G.A.F. Seelig, supra,* had the effect of excluding importation of wholesome milk produced out of state. Thus, the ordinance discriminated against interstate commerce by "erecting an economic barrier protecting a major local industry against competition from without the state" in violation of the Commerce Clause. 340 U.S. at 354.

A feature common to all three of these regulatory schemes was that they burdened the free flow of goods in commerce between the states by effectively hindering either the import or export of goods. And whether this burden on the movement of goods be direct and apparent on the face of the statute as in *Baldwin v. G.A.F. Seelig, supra,* or indirect as in *H. P. Hood & Sons v. DuMond, supra,* and *Dean Milk Co. v. Madison, supra,* the Court could conclude that the purpose and effect of the statute was primarily to protect a local industry by discriminating against interstate commerce. The Maryland statute here under consideration, however, differs in several substantial ways.

First, Chapter 854 would not in any way restrict the free flow of petroleum products into or out of the state. The Act merely regulates a wholly intrastate activity,the retail marketing of gasoline within the state. Producers and refiners would still remain free to import and sell petroleum products to wholesalers and to retail

service station dealers. The only restriction is that producers and refiners may not operate retail service stations in Maryland with their own employees but must do so with retail service station dealers.

Second, although the oil companies contend that the purpose of the Act was to protect local economic interests from the competition of oil companies engaged in interstate commerce, in view of the legislative history of the Act we cannot agree with this contention. There is every indication that the purpose of the statute was to preserve competition within the retail gasoline marketing industry in Maryland. As previously discussed, the Comptroller's report, as well as other evidence presented to the Legislature, indicated that company operated stations received greater allocations of gasoline during a period of shortage than did dealer operated stations, forcing many dealers out of business. Moreover, there was evidence that the oil companies intended to increase the number of company operated stations. The General Assembly, after considering the activities of producers and refiners in the industry, concluded, as have several congressional committees, that the recent trend of increased direct operation of service stations by producers and refiners, if allowed to continue, could substantially decrease competition and lead to the control of that market by a few major oil companies. *See* H. R. Rep. 94-1762, 94th Cong., 2d Sess. 28 (1976); H. R. Rep. No. 1423, 84th Cong., 1st Sess. 17 (1955). Thus, the purpose was not to protect Maryland interests from out-of-state competition.

Finally, the Act does not in effect discriminate against out-of-state economic interests as opposed to local interests. The Act is equally applicable to all producers and refiners. While oil is not produced in Maryland, and is not presently being refined in Maryland, there are producers or refiners which are Maryland corporations, or are headquartered here, or have substantial facilities here, or do a significant portion of their business here. All such "Maryland" businesses are prohibited by the Act from operating

retail service stations. If a refiner were to build refineries in Maryland, and were to engage in business solely within Maryland, it would be prohibited by the Act from marketing through a company operated station. On the other hand, out-of-state and Maryland retailers are treated the same. An out-of-state marketer not engaged in producing or refining may continue to market in Maryland through retail service stations operated with company personnel.

The only Supreme Court case of which we are aware which considers a challenge to a state divestiture statute on Commerce Clause grounds is *Crescent Oil Co. v. Mississippi*, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166 (1921).[5] There, a Mississippi statute prohibited both out-of-state and Mississippi corporations engaged in the manufacture of cotton seed oil or cotton seed meal from owning or operating cotton gins. It was argued that the statute was enacted because the legislature believed that manufacturers of cotton seed oil or meal, if also allowed to operate cotton gins, would depress the price charged for ginning in order to suppress competition in the ginning industry. The petitioner contended that the statute imposed a direct and unconstitutional burden on interstate commerce. The Court rejected this contention, pointing out that the statute regulated only a manufacturing process conducted within the state.

In holding in *Crescent Oil* that the Mississippi statute did not violate the Commerce Clause, the Supreme Court noted that the activity to be regulated was intrastate manufacturing and not interstate commerce. While we recognize that the distinction between "manufacturing" and "commerce" is no longer the test

[5] *See also* Paramount Pictures v. Langer, 23 F. Supp. 890, 895 (D. N.D. 1938, *remanded with directions to dismiss on grounds of mootness*, 306 U.S. 619, 59 S. Ct. 641, 83 L. Ed. 1025 (1939), where a statute prohibiting the operation of motion picture theaters in the state of North Dakota which were owned, controlled, or managed by producers or distributors of motion picture films was held not to violate either the due process clause or the equal protection clause of the Fourteenth Amendment or the Commerce Clause.

of *congressional* power to regulate activities under the Commerce Clause, *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), it may be of some significance in determining a *state's* authority. The fact that Congress may regulate in this area does not necessarily result in the loss of the state's power to regulate an intrastate activity which may possibly have some effect on interstate commerce. The Supreme Court, in *Cities Service Co. v. Peerless Co.*, 340 U.S. 179, 186-187, 71 S. Ct. 215, 219-220, 95 L. Ed. 190 (1950), stated:

> "The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley v. Port Wardens*, 12 How. 299 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker v. Brown*, 317 U.S. 341 (1943); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. *South Carolina Highway Dept. v. Barnwell Bros., supra.*"

See also Huron Cement Co. v. Detroit, 362 U.S. 440, 443-444, 80 S. Ct. 813, 4 L. Ed. 2d 852, 78 A.L.R.2d 1294 (1960); *Breard v. Alexandria*, 341 U.S. 622, 634, 71 S. Ct. 920, 95 L. Ed. 1233, 35 A.L.R.2d 335 (1951); *Panhandle Co. v. Michigan Comm'n*, 341 U.S. 329, 71 S. Ct. 777, 95 L. Ed. 993 (1951); *Bowie Inn v. City of Bowie, supra*, 274 Md. at 244-245.

More recently, the Court has indicated that in determining the validity of a state statute affecting interstate commerce, a balancing of the state interest involved in relation to the burden imposed upon interstate commerce may sometimes be appropriate. This "weighing test" was described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), as follows:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit,* 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona,* 325 U.S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See, *e.g., Shafer v. Farmers Grain Co., supra* [268 U.S. 189]."

Applying these principles, we conclude that the divestiture provisions of the Act do not violate the Commerce Clause. The Act does not discriminate against interstate commerce as all producers and refiners, whether in or out of the state, are affected equally. The promotion of the economic welfare is a legitimate interest of a state, *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 143; *Parker v. Brown,* 317 U.S. 341, 363, 63 S. Ct. 307, 87 L. Ed. 315 (1943), and it has long been recognized that the states have the power to pass legislation to promote competition by preventing

monopolistic activity in restraint of trade, *Watson v. Buck,* 313 U.S. 387, 403-404, 61 S. Ct. 962, 85 L. Ed. 416, 136 A.L.R. 1426 (1941); *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 107, 29 S. Ct. 220, 53 L. Ed. 417 (1909).

The record, on the other hand, fails to establish that the Act will, to a significant degree, burden interstate commerce. The allegations of the oil companies that the restrictions placed on producers and refiners will limit the availability of products and services to those traveling in interstate commerce is, at best, highly speculative. *Bowie Inn v. City of Bowie, supra.* Most of the producers and refiners have in the past operated only a small percentage of the retail service stations which they supply. The vast majority of retail service stations in Maryland, supplying both interstate and intrastate travelers, are operated by independent dealers.[6] It is true that three of the oil companies involved in this action do market exclusively through company operated stations,[7] and officials of these companies indicated at trial that they might be forced to withdraw from the Maryland market if the Act were to become effective. However, at least two of these company witnesses on cross-examination indicated that no firm decision had been made to withdraw if the Act were to become effective, and that it still might be possible to distribute products in Maryland both

[6] For example, according to facts stipulated by the parties, as of July 1, 1974, of the 632 stations affiliated with Exxon Corporation in the state of Maryland, only 36 were company operated. Similarly, only 1 of 219 stations affiliated with Gulf Oil Corporation was company operated. Phillips Petroleum Company, with 131 Maryland stations, operated only 13 with company personnel. Shell Oil Company had 284 Maryland affiliated stations, but only 1 was company operated. Texaco, Incorporated, which had 307 affiliated stations in Maryland as of July 1, 1974, had no station operated with company personnel.

[7] Ashland Oil, Inc.; Kayo Oil Company; Petroleum Marketing Corporation. As of July 1, 1974, Ashland had 19 stations in Maryland; Kayo, 16 stations; and Petroleum Marketing Corporation, 21 stations.

through dealer operations and on the wholesale market. It therefore appears that there will be no significant disruption of the flow of petroleum products into the state nor in the distribution of those products to those in interstate commerce. We believe that the state's interest, as determined by the Legislature, outweighs any slight burden which the Act may impose on interstate commerce.

For all of the above reasons, the divestiture provisions of the Maryland Act are not unconstitutional under the Commerce Clause.

(3) *Unconstitutional Taking*

The trial court held that the divestiture provisions of the Act constitute a taking of private property without just compensation, in violation of Art. III, § 40 of the Maryland Constitution and the just compensation clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment.

For government restriction upon the use of property to constitute a taking in the constitutional sense, so that compensation must be paid, the restriction must be such that it essentially deprives the owner of all beneficial uses of his property. As this Court stated in *Baltimore City v. Borinsky,* 239 Md. 611, 622, 212 A.2d 508 (1965):

> "The legal principles whose application determines whether or not the restrictions imposed . . . on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the . . . action results in substantial loss or hardship."

Goldblatt v. Hempstead, 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168, 78 S. Ct. 1097, 1104, 2 L. Ed. 2d 1228 (1958); *Bureau of Mines v. George's Creek,* 272 Md. 143, 165, 321 A.2d 748 (1974); *Rockville v. Stone,* 271 Md. 655, 663-664, 319 A.2d 536 (1974).

The Maryland Act, in prohibiting producers and refiners from directly operating retail service stations, clearly does not constitute a "taking" in the constitutional sense. The divestiture provisions of the Act do not deprive producers and refiners owning retail service stations of all beneficial uses of their property, or even of the existing and presumably most profitable use of their property. As previously discussed, the majority of retail service stations are now operated by dealers and not employees. Thus the Act will have less impact, for example, than the zoning provisions upheld in *Goldblatt v. Hempstead, supra,* or *Baltimore City v. Borinsky, supra,* which deprived the owners of the most profitable use of the property. The relatively few service stations directly operated by producers and refiners may continue to be used as service stations, as producers and refiners may lease the property to dealers. The Maryland Act does not prohibit an oil company from owning a retail service station or having the station operated as a retail outlet for that company's products. It merely requires that the station be operated by a retail dealer rather than by company employees.

Moreover, allowance for the temporary operation by refiners and producers, as well as reasonable exceptions to the divestiture dates, as provided by the Act in Paragraphs G and H, will also lessen the impact of the divestiture provisions on producers and refiners.

In sum, the restrictions imposed by the divestiture provisions of the Act on the manner in which oil companies may continue to use their property for retail service station purposes, *i.e.,* using retail dealers instead of employees, does not amount to a "taking" of

private property in violation of the federal or state constitutions.

(4) *Equal Protection*

The oil companies argue, and the trial court held, that the divestiture provisions of the Act constitute a denial of the equal protection of the laws in that they prohibit only producers and refiners of petroleum products from operating retail service stations while permitting "wholesalers, mass merchandisers, food retailers, and gasoline marketers" to operate retail service stations. It is claimed that the classification is arbitrary and without any rational basis.[8]

The proper standard of review when economic regulation is challenged as violating the Equal Protection Clause of the Fourteenth Amendment has been most recently discussed by the Supreme Court in *City of New Orleans v. Dukes*, ___ U.S. ___, 96 S. Ct. 2513, 2516-2517, 49 L. Ed. 2d 511 (1976):

> "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require

[8] The oil companies, both at trial and on appeal, contend that the Act deprives them of the equal protection of the laws in violation of both the Fourteenth Amendment to the United States Constitution and the Due Process Clause, Art. 23, of the Maryland Declaration of Rights. The Maryland Constitution does not contain an express equal protection clause as does the Fourteenth Amendment. The trial court's equal protection holding was apparently premised upon the Due Process Clause of the Maryland Declaration of Rights. For the purposes of appeal, we shall assume that the Due Process Clause, Art. 23, embodies the concept of equal protection. Bruce v. Dir., Chesapeake Bay Aff., 261 Md. 585, 600, 276 A.2d 200 (1971); Celanese Corporation v. Davis, 186 Md. 463, 471-472, 47 A.2d 379 (1946). *Cf.* Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). We shall further assume that the standard of review under both the Maryland Constitution and the Equal Protection Clause of the Fourteenth Amendment is the same where economic regulation is challenged on equal protection grounds.

> only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e.g., Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952), in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."

If the classification is not purely arbitrary and has a rational basis, the statute does not violate the Equal Protection Clause. *McGowan v. State of Maryland*, 366 U.S. 420, 425-428, 81 S. Ct. 1101, 1104-1106, 6 L. Ed. 2d 393 (1961); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 51 L. Ed. 369 (1911); *Bowie Inn v. City of Bowie, supra*, 274 Md. at 240-241; *Adm'r, Motor Veh. Adm. v. Vogt*, 267 Md. 660, 670-678, 229 A.2d 1 (1973); *Brooks v. State Board, supra*, 233 Md. at 114-115. Moreover, a statutory classification will not be held to violate the equal protection clause if there exists any state of facts which reasonably can be conceived to sustain it. *Davidson v. Miller*, 276 Md. 54, 69-70, 344 A.2d 422 (1975); *Matter of Trader*, 272 Md. 364, 391-392, 325 A.2d 398 (1974).

The statutory distinction between producers and refiners on the one hand, and other sellers of petroleum products on the other, is not arbitrary. As discussed previously, the Legislature determined that prohibiting producers and refiners from operating retail service stations was necessary to preserve competition. Furthermore, the Legislature may well have determined that discrimination against retail service station dealers and in favor of company operated stations, in the distribution of petroleum products, was an evil which could be

cured by preventing producers and refiners from operating retail service stations. Thus, the classification bears a rational relationship to the objective of the Act of preserving competition and fairness within the Maryland retail gasoline marketing industry. Consequently, there is no merit to the oil companies' argument that the Act denies them the equal protection of the laws.

(5) *Unlawful Delegation*

The contention that Paragraphs G and H of the Act constitute an unlawful delegation of legislative authority in violation of Art. 8 of the Maryland Declaration of Rights is also without merit. Ordinarily when legislative authority is delegated to administrative officials, there must be sufficient standards for the guidance of the administrative officials. However, it has been recognized that the complexity of modern economic conditions may make it impossible to tailor specific guidelines for every conceivable situation and that latitude in granting discretion is necessary. As stated in *Pressman v. Barnes*, 209 Md. 544, 555, 121 A.2d 816 (1956):

> "It is recognized that it would not always be possible for Legislature or City Council to deal directly with the multitude of details in the complex situations upon which it operates. . . . The modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases."

See also Montgomery County v. Walsh, 274 Md. 502, 523-524, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901, 96 S. Ct. 1091, 47 L. Ed. 2d 306 (1976). It would obviously be impractical for the Legislature to set specific guidelines to govern all situations where exceptions to the divestiture dates would be reasonable or where it would be necessary for a producer or refiner to operate a service station on a temporary basis. This

grant of authority to the Comptroller is necessary and is constitutional.

(6) *Conflict with the Federal Emergency Petroleum Allocation Act*

The trial court held that Paragraph F of the Maryland Act conflicts with and is therefore preempted by the Federal Emergency Petroleum Allocation Act of 1973.

Paragraph F of the Act provides that during periods of shortages, producers, refiners and wholesalers shall "apportion uniformly" gasoline and special fuels (which, as defined in Art. 56, § 157A(2), includes diesel oils) to all retail service station dealers "on an equitable basis" and "shall not discriminate among the dealers in their allotments." In view of the history of the Act, it is clear that the Legislature by this provision intended to prevent the inequitable distribution of petroleum products, reflected by the Comptroller's study, which occurred during periods when a particular supplier had insufficient supplies to satisfy its dealers' requirements. To prevent a supplier from favoring one dealer over another during a period when the supplier was experiencing a shortage, the Act requires that the available product be alloted to each dealer on the same basis. In other words, when supplies are insufficient to meet dealer requirements, there must be a pro rata reduction to each dealer.

In its fundamental purpose, Paragraph F of the Maryland Act is in harmony with the Emergency Petroleum Allocation Act, 15 U.S.C. 751 *et seq*. The federal act provides for the promulgation of regulations for the allocation of, *inter alia*, refined petroleum products. 15 U.S.C. 753. The federal act goes on to state that the regulations, to the "maximum extent practicable," shall provide for the "equitable distribution of . . . refined petroleum products . . . among all . . . sectors of the petroleum industry, including . . . non branded independent marketers, [and] branded independent marketers . . . ." 15 U.S.C. 753(b)(1)(F). To achieve this

objective of equitable distribution, the federal act further states that regulations should provide, where practicable, for a pro rata reduction in allocation to each branded and unbranded independent marketer where there is insufficient product to supply each with the amounts supplied in a prior corresponding base period. 15 U.S.C. 753(c)(1)(A). As originally enacted, the President's authority to promulgate regulations was to terminate on February 28, 1975. This authority has been extended several times, and has been extended most recently to September 30, 1981, by Pub. L. No. 94-163, § 461 (1975).

By its express terms, the federal Emergency Petroleum Allocation Act preempts only such state regulations of allocation of refined petroleum products which are in actual conflict with regulations promulgated pursuant to it. Thus, 15 U.S.C. 755(b) provides that:

> "The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

Therefore we need not determine whether the existence of a comprehensive system of federal regulation necessarily precludes state regulation, as Congress has specifically limited the type of state regulation which is preempted. We need only determine whether Paragraph F of the Maryland statute conflicts with any regulation promulgated pursuant to the Emergency Petroleum Allocation Act.

The federal regulations promulgated pursuant to the federal act establish a scheme of equitable petroleum allocation. Each supplier must determine its "allocation fraction" which is "equal to its allocable supply . . . divided by its supply obligation . . . ." 10 C.F.R. § 211.10(b). This fraction is then applied to each purchaser's "base period volume" to determine the

purchaser's allocation. In other words, each purchaser is allocated petroleum products based upon the seller's total supplies relative to the seller's total obligations. Where the allocation fraction is less than one, that is, where a supplier's allocable supply is less than his supply obligation for a base period, the supplier must reduce on a *pro rata basis* the amounts sold to purchasers. 10 C.F.R. § 211.10(f). This scheme is applicable to the allocation of motor gasoline, 10 C.F.R. § 211.107(b), as well as diesel fuel, 10 C.F.R. § 211.126(b), and as discussed above, is entirely consistent with Paragraph F of the state Act.

The Maryland Act requires that gasoline and special fuels be apportioned "uniformly," on "an equitable basis" to all retail service station dealers during a period of shortage.

The oil companies in arguing that Paragraph F of the Maryland statute is in conflict with the federal regulatory scheme, point to several factors affecting allocations under the federal regulations which may allow allocation on other than a "uniform" basis which they contend is required by Paragraph F. *See, e.g.*, 10 C.F.R. § 211.14(b), permitting a 5% reduction in monthly allocable supply to an area within a state to meet regional imbalances. We do not believe that the Legislature, in requiring that petroleum products be apportioned "uniformly," intended that the Comptroller could not take into account, as do the federal regulations, other factors affecting allocation and distribution of petroleum products which might result in varying allocations to certain dealers. Although petroleum products are to be apportioned "uniformly," allocation is also to be on an "equitable basis." By thus modifying "uniformly," it would appear that the Legislature contemplated that certain equitable factors might require variations in an otherwise uniform scheme of gasoline and special fuel allocation.

Consequently, we do not find that Paragraph F of the Maryland statute inherently conflicts with any regulation pursuant to the Emergency Petroleum Allocation

Act of 1973. We find that Paragraph F is in harmony with the Emergency Petroleum Allocation Act which expressly preserves the power of the states to regulate the allocation of refined petroleum products. As the State concedes, the Comptroller may not order allocation of petroleum products in conflict with the federal regulations enacted pursuant to the Emergency Petroleum Allocation Act or promulgate regulations pursuant to Art. 56, § 157B(a) which would conflict with present or future federal regulations. *Cf. Rice v. Board of Trade of City of Chicago*, 331 U.S. 247, 67 S. Ct. 1160, 91 L. Ed. 1468 (1947). However, enforcement of the provisions in accordance with federal standards would be proper.

(7) *Conflict with the Robinson-Patman Act*

Before the trial in this case commenced, the circuit court granted a motion for partial summary judgment filed by Exxon, Shell and Gulf regarding Paragraph D of the Maryland Act which requires that suppliers extend "voluntary allowances" uniformly to all retail service station dealers supplied. The trial court held that Paragraph D is in conflict with § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13, and is therefore invalid under the Supremacy Clause, Art. VI of the United States Constitution.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), provides in part that "[i]t shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . ." However, § 2(b) of the same Act, 15 U.S.C. 13(b), provides a seller with a defense to a charge of price discrimination "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . ." The oil companies contend, and the court below held, that in requiring that voluntary allowances be extended to all retail service stations

within the state, the state Act deprives sellers of a federal right to discriminate in price between purchasers where necessary to meet an equally low price of a competitor as provided by § 2(b) of the federal act.

In determining whether a conflict exists between Paragraph D of Ch. 854 and § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, it is necessary both to determine the meaning of "voluntary allowances" as used in Paragraph D of the state statute and to ascertain the scope of the "meeting competition" defense in § 2(b) of the federal statute.

Turning to the meaning of "voluntary allowances" in Paragraph D, where a term used in a statute relating to a particular trade or industry does not have a common usage, then the term is presumed to be used in the commercial sense. As was said in *Armco Steel v. State Tax Comm.*, 221 Md. 33, 41-42, 155 A.2d 678 (1959):

> "When terms in a statute are used relating to trade or commerce, absent legislative intent to the contrary, the terms are presumed to be used in their trade or commercial meaning. 2 Sutherland, *Statutory Construction*, § 4919 (3d ed. 1943). . . . [I]t must be presumed that [the Legislature] possessed at least the common knowledge about that industry."

See also Perdue v. St. Dep't of Assess. & T., 264 Md. 228, 234-235, 286 A.2d 165 (1972).

The State asserts that a " 'voluntary allowance' is oil industry jargon for a rebate of a portion of the otherwise uniform 'tank wagon (wholesale) price' paid by all dealers of a particular brand for their gasoline." (Appellants' brief, p. 40.) The Comptroller's report also defined voluntary allowances as discounts extended by suppliers to certain dealers to enable those dealers to meet competition. The oil companies do not disagree with the State's definition of "voluntary allowances."[9]

[9] The oil companies, however, do contend that the term "voluntary allowances" is unconstitutionally vague in that it may refer to other types of assistance extended to dealers such as rent relief in certain situations. For the reasons to be

In fact, affidavits filed by the oil companies in support of the motion for partial summary judgment, as well as stipulations of facts, support the State's position. Thus, an affidavit filed by a Shell marketing manager states:

> "Under specified market conditions, Shell grants temporary price reductions, or 'competitive allowances,' to its branded retail dealers. Shell's purpose in granting competitive allowances is to provide competitive and equitable assistance in gasoline prices to Shell dealers who are injured by local competitive gasoline price reductions of competing retailers which are subsidized by their suppliers."

To similar effect are affidavits filed by Exxon and Gulf.

This definition of "voluntary allowances" is supported by congressional reports dealing with the retail marketing of gasoline. The practice of granting temporary price reductions in the wholesale price to selected dealers to "meet competition" has long been in use and has been criticized in congressional reports as a means of controlling price competition in small, localized areas. In hearings before the Senate Select Committee on Small Business investigating a gasoline price war, one major oil company official described "voluntary allowances" as

> "a method of extending price assistance to an individual dealer to assist him in meeting price competition with which he is faced, to aid him in maintaining volume, and to help him, as an independent businessman, stay in business and protect his investment. *At the same time, because of its application to dealers on an individual basis, the plan tends to help localize the price disturbance.*" S. Rep. No. 2810, 84th Cong., 2d Sess. 19 (1956). (Emphasis supplied).

See also H.R. Rep. No. 1423, 84th Cong., 1st Sess. 12-17 (1955). There, as here, the practice of granting voluntary allowances to dealers to enable those dealers to

discussed below, we do not find that "voluntary allowances" as used in Paragraph D encompasses such a broad spectrum of dealer assistance and is limited to certain price discounts.

meet the price competition of other dealers was justified by the oil companies as being permissible price discrimination within the § 2(b) defense. S. Rep. No. 2810, 84th Cong., 2d Sess. 20.

Finally, in addition to the statements of the parties and the congressional reports, the legislative history of the Maryland statute confirms that the term "voluntary allowances" as used in Paragraph D refers to the pricing practices described by the oil companies. The Comptroller's report refers to the practice of temporary, selective price reductions, and indicates that the amount of these reductions varied considerably. The statement of an oil company executive at the hearings conducted by the Senate Economic Affairs Committee and the House Economic Matters Committee on the Act denies that price assistance is not offered on an equitable basis and takes the position that selective, localized price reductions are necessary and beneficial to dealers. Consequently, it appears that Paragraph D was intended to prevent the practice of localized price discounts, the Legislature believing that all retail service station dealers of the same brand should be treated equally. This is consistent with other provisions of the Act which are intended to eliminate discrimination against retail dealers by their suppliers.

Therefore, in view of the principle of statutory construction that terms relating to a particular industry are presumed to be used in their commercial sense in the absence of any common meaning to the contrary, and in light of industry practices and legislative history, we construe "voluntary allowances" to mean temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer.

The oil companies do not argue that Paragraph D is in general conflict with the Robinson-Patman Act. Rather their contention is based solely upon the availability of the § 2(b) defense where temporary price reductions are granted to a dealer to enable the dealer to meet the competition of another dealer. Such

competition at the retail level would occur basically in two situations. Either a competing retail dealer would lower its price on its own or a competing retailer would lower its price after receiving a reduction in the wholesale price from its supplier. We must determine, then, whether the § 2(b) defense would be available if a voluntary allowance were granted to a retail dealer to meet either one of these competitive situations.

It is settled that the § 2(b) defense is not available to a supplier where a discriminatory price cut is granted to a dealer to enable that dealer to respond to a competing dealer's price cut where the competing dealer does not receive a price cut from its supplier. In *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 505, 83 S. Ct. at 358, Sun Oil Company granted a discriminatory price reduction to one of its retail dealers to enable that dealer to meet the lower price of a retail competitor. There was no showing that the lower price of the retail competitor was supported by an enabling price cut from its own supplier, and therefore the Court assumed that the retail competitor was unaided by its supplier. The Court held that the § 2(b) "good faith meeting competition" defense was not available to the supplier, as that defense applies only where the seller's reduction in price is made to meet "the lower price of his own competitor" and not the lower price of his customer's competitor. 371 U.S. at 529.

However, the Supreme Court in *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 512 n. 7, 83 S. Ct. at 363 n. 7, specifically reserved the question of whether the § 2(b) defense is available if the seller's discriminatory price cut to its dealer is in response to a price cut made by a competitor of the seller to the competitor's dealer. There is a conflict in the lower federal courts on this question. In *Enterprise Industries v. Texas Company,* 136 F. Supp. 420, 421 (D. Conn. 1955), *reversed on other grounds,* 240 F. 2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914 (1957), the court held that the § 2(b) defense is available to a supplier only where the discriminatory price is

offered to a buyer in response to an equally low price offered *to that same buyer* by a competitor of the supplier. In other words, the § 2(b) defense is available only where the discriminatory price reduction is offered to retain a customer in the face of a "price raid" on that customer by a competitor of the seller. In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana),* 466 F.2d 1163, 1175 (7th Cir. 1972), on the other hand, the court held that the defense is available if the supplier's lower price is offered to its dealer to meet the equally low price offered by a competitor of the supplier to its dealer. The court relied on the Federal Trade Commission's most recent interpretation of § 2(b) as announced in the Commission's *Report on Anti-Competitive Practices in the Marketing of Gasoline,* 3 Trade Reg. Rep., ¶ 10,373 at 18,245 (1967), where the Commission reversed its position on § 2(b) and abandoned its support of the *Enterprise* holding on which it had relied in *Federal Trade Comm'n v. Sun Oil Co., supra. See* Note, *Gasoline Marketing and the Robinson-Patman Act,* 82 Yale L. J. 1706, 1713 n. 44 (1973).

Although the question is not without doubt, based upon the limited nature of the § 2(b) defense and the purposes of the Robinson-Patman Act as discussed in *Federal Trade Comm'n v. Sun Oil Co., supra,* and *Standard Oil Co. v. Trade Comm'n,* 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), we agree with the interpretation of § 2(b) set forth in *Enterprise Industries v. Texas Company, supra.* As the Court observed in *Federal Trade Comm'n v. Sun Oil Co., supra,* the purpose of the Robinson-Patman Act was "to obviate price discrimination practices threatening independent merchants and businessmen . . . 371 U.S. at 520, 83 S. Ct. at 367. To accomplish this goal, the Robinson-Patman Act amended the Clayton Act to limit the § 2(b) defense to only those situations where the discriminatory price was offered "to meet an equally low price of a competitor." Prior to the Robinson-Patman Act, a defense was available where the discriminatory price concession "was made in good faith to meet competi-

tion." The House Committee in its report on the Act, said of this revision (H. R. Rep. No. 2287, 74 Cong., 2d Sess. 16 (1936)):

> "This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices *until his competition has first offered lower prices,* and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." (Emphasis supplied.)

This, in combination with the qualified wording of the § 2(b) defense when compared with the more expansive prohibition against price discrimination contained in § 2(a), led the Supreme Court to conclude that the defense was available only where the grantor of the discriminatory price was responding to price competition at his own level and not that at the level of the buyer who receives the discriminatory price. 371 U.S. at 514-515, 83 S. Ct. at 364-365.

Although the Court in *Sun Oil Company* did not decide if the § 2(b) defense is available only where two sellers are competing for the same customer, it did observe that this is the "more normal circumstance" where the § 2(b) defense is applicable. 371 U.S. at 526. *See, e.g., Krieger v. Texaco, Inc.,* 373 F. Supp. 108 (W.D. N.Y. 1973). The purpose of the § 2(b) defense was discussed in these terms in *Standard Oil Co. v. Trade Comm'n, supra,* 340 U.S. at 249-250, where the Court stated that the § 2(b) defense is available to a seller to prevent a "price raid" by permitting a seller "to retain a customer by realistically meeting in good faith the price

offered to that customer, without necessarily changing the seller's price to its other customers." To expand the § 2(b) defense beyond this situation, allowing a supplier selectively to reduce its price to a dealer where that dealer faces competitive pressures from another retail dealer aided by lawful reductions from its supplier, would frustrate the overall purpose of antitrust laws to promote competition. Selective price discounts allow sellers to suppress competition, especially from independent, non-branded dealers, in a relatively small area without offering lower prices on a more generalized basis. The use of voluntary allowances to enable petroleum suppliers to inhibit rather than foster competition has been recognized in studies on the retail marketing industry. H. R. Rep. No. 1423, 84th Cong., 1st Sess. 12017; S. Rep. No. 2810, 84th Cong., 2d Sess. 19023. As the Supreme Court said in *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 523, 83 S. Ct. at 369, "[s]o long as the wholesaler can meet challenges to his pricing structure by wholly local and individualized responses, it has no incentive to alter its overall pricing policy."[10] Commentators have also concluded that to expand the § 2(b) defense to permit petroleum suppliers to extend localized, discriminatory price cuts to a retail dealer to enable that dealer to meet the lower price of a competing retail dealer, which is subsidized by a price cut by the supplier's competitor, would be inconsistent with the purpose and legislative history of the Robinson-Patman Act. Note, *Gasoline Marketing and the Robinson-Patman Act, supra; The Supreme Court, 1962 Term,* 77 Harv. L. Rev. 81, 173-176 (1963).

Consequently, we believe that the § 2(b) defense is available only where the discriminatory price reduction is to meet the equally low price offered to *the same*

[10] As the Court suggested in Federal Trade Comm'n v. Sun Oil Co., *supra,* 371 U.S. at 526, 83 S. Ct. at 370, sellers may, as an alternative to selective, discriminatory price cuts, reduce wholesale prices over a wider competitive area "so as to preclude the probable incidence of the substantial anticompetitive effects upon which [a] violation of § 2(a) is . . . grounded."

buyer by a competing seller. The oil companies, by relying on *Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974), seem to suggest that even in this situation, where a discriminatory price reduction is offered to a dealer to meet an equally low price offered to that same dealer by a competing supplier, Paragraph D of the Maryland Act would require that the discount be offered to all retail service station dealers supplied. However, we have construed "voluntary allowances" in the state Act to mean only those price reductions offered to retail dealers to enable the dealer to meet the lower price of a *competing retail dealer*. Thus, there is no conflict between Paragraph D and § 2(b) of the Clayton Act as amended by the Robinson-Patman Act. Paragraph D of the state Act encompasses only the situation where temporary price reductions are given to a dealer to meet the lower price of a *competing dealer*, and, in our view, § 2(b) of the federal Act does not extend to that situation.

Moreover, even if the Legislature were to extend the concept of "voluntary allowances" to include the situation where a price reduction is offered to a retail dealer to meet the equally low price offered to that *same dealer* by a competing supplier, there has been no suggestion that such a situation occurs with any frequency in the oil industry. Consequently, in most situations where temporary price reductions are extended, there would be no conflict between the Maryland statute and the federal statute. If, however, a conflict did arise, the Maryland statute would be preempted only to the extent necessary to avoid the conflict and not in its entirety as the oil companies suggest. *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933, 937 n. 5, 47 L. Ed. 2d 43 (1976); *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470, 491-492, 94 S. Ct. 1879, 1891, 40 L. Ed. 2d 315 (1974); *State v. Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W.2d 918, 923 (1961) (concurring opinion).

As previously indicated, the contention of the oil companies on appeal that Paragraph D is in conflict with the Robinson-Patman Act is premised solely upon the availability of the § 2(b) defense where voluntary allowances are granted. Nevertheless, the trial court in its opinion had also found that Paragraph D would obstruct the accomplishment and execution of the purposes of the Robinson-Patman Act. Where a state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress,' " it is void under the Supremacy Clause, *Kewanee Oil Company v. Bicron Corp., supra,* 416 U.S. at 479, 94 S. Ct. at 1885, quoting *Hines v. Davidowitz,* 312 U.S. 52, 61 S. Ct. 299, 85 L. Ed. 851 (1941). However, the objectives of both laws must be examined, *Kewanee Oil Company v. Bicron Corp., supra,* 416 U.S. at 480, 94 S. Ct. at 1885, and, where possible, the operation of both should be reconciled so as to avoid preemption, *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 127, 94 S. Ct. 383, 389-390, 38 L. Ed. 2d 348 (1973). But it is not necessary to attempt to reconcile Paragraph D and the Robinson-Patman Act as the purpose and objectives of both are the same. The purpose of the Robinson-Patman Act was " 'the preservation of equality of opportunity' " by assuring "that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *Federal Trade Comm'n v. Sun Oil Co., supra,* 371 U.S. at 520, 83 S. Ct. at 367. This is precisely the purpose of Paragraph D: to insure that all retail service station dealers are afforded equal treatment and to prevent discrimination among dealers of the same supplier. Therefore, Paragraph D is not an obstacle to the accomplishment of the same objective.

Consequently, we hold that Paragraph D of the Maryland Act is not invalid under the Supremacy Clause of the United States Constitution.

(8) *Void for Vagueness*

The oil companies contend that several terms in the Act, which imposes criminal sanctions for violations,

are so vague as to constitute a denial of due process of law in violation of Art. 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The terms which are allegedly vague are: "producer or refiner"; "voluntary allowances" and "uniformly" as used in Paragraph D; "equipment rentals" and "uniformly" as used in Paragraph E; and "periods of shortage" and "uniformly . . . on an equitable basis" as used in Paragraph F.

The standard for determining whether a criminal statute is void for vagueness was set forth in *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Connally v. General Const. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926); *Bowie Inn v. City of Bowie, supra*, 274 Md. at 239-240; *Giant of Md. v. State's Attorney*, 267 Md. 501, 514-515, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915, 93 S. Ct. 2733, 37 L. Ed. 2d 141 (1973). Where a statute regulates commercial activity, the standard of ordinary intelligence is one of "ordinary commercial knowledge." In other words, the statute must be sufficiently definite so as to inform one possessing "ordinary commercial knowledge" of what conduct is prohibited. *McGowan v. State of Maryland, supra*, 366 U.S. at 428, 81 S. Ct. at 1106 (holding that an exception to the Maryland Sunday closing laws permitting the retail sale of " 'merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks et cetera" was not unconstitutionally vague); *Potomac Sand & Gravel v. Governor, supra*, 266 Md. at 379 (holding that a statute prohibiting the dredging of sand or gravel in "marshlands" was not unconstitutionally vague). Where necessary, the constitutional requirement of definiteness may be satisfied by a reasonable construction of the statute by the courts. *United States v. Harriss, supra*, 347 U.S. at 618, 74 S. Ct. at 812; *Potomac Sand & Gravel v. Governor, supra*, 266 Md. at 379.

Most of the allegedly vague provisions of the Act, such as "voluntary allowances uniformly," as used in Paragraph D, and "periods of shortage," "uniformly" and "on an equitable basis" as used in Paragraph F, have already been discussed. These provisions are, in our view, sufficiently definite so as not to constitute a denial of due process of law. Likewise, we find, as did the trial court, that the term "producer or refiner" is not unconstitutionally vague. A producer, as used in the Act, is a person, firm or corporation engaged in the production of crude oil, *i.e.*, extracting crude oil from the earth. A refiner is one engaged in refining crude oil.

Nor do we find that Paragraph E, which requires that all equipment rentals be applied uniformly to all retail service station dealers supplied, is unconstitutionally vague. Affidavits filed by the oil companies indicated that certain equipment supplied to retail service station dealers is customarily included in the lease of the station. However, certain other items such as "identification signs and credit card imprinters" are not included in the lease but are rented separately to each dealer. We think that the term "equipment rentals" refers to that equipment which, according to industry practice, is supplied to the dealer separate from the lease of the service station. And consistent with the policy of the Maryland Act that all retail service station dealers be treated equally by their supplier, Paragraph E mandates that all dealers be charged the same rental for like equipment.

(9) *Severability*

The oil companies' final argument is that the various provisions of Ch. 854 are not severable. Recognizing that their substantive due process, commerce clause,

unconstitutional taking and equal protection arguments are directed solely at the Act's divestiture provisions (Paragraphs B and C), whereas Paragraphs D and F are challenged only on Supremacy Clause grounds, the oil companies contend that if any of these challenges is accepted by this Court, then the entire Act should be held invalid. (Appellees' brief, p. 66). They maintain that the Legislature intended the Act to be "an integrated whole." (*Ibid.*) With respect to the issue of severability, *see* Maryland Code (1957, 1976 Repl. Vol.), Art. 1, § 23; *Blackwell v. State*, 278 Md. 466, 473-474, 365 A.2d 545 (1976); *Shell Oil Co. v. Supervisor*, 276 Md. 36, 48-49, 343 A.2d 521 (1975), and cases therein cited. However, since we have rejected all of the challenges to the Act's provisions made by the oil companies in this Court, the issue of severability is not now presented for decision.

Judgment of the Circuit Court for Anne Arundel County reversed, and case remanded to that court for entry of a judgment in accordance with this opinion.

Appellees to pay costs.

APPENDIX B

In the Court of Appeals of Maryland

No. 10

September Term, 1976

Governor of the State of Maryland, et al.
v.
Exxon Corporation, et al.

On Motions for Reconsideration and Stay of Mandate

Before Murphy, C.J., and Smith, Digges, Levine and Eldridge, J.J., and James C. Morton, Jr., and Ridgely P. Melvin, Jr., Associate Judges of the Court of Special Appeals, specially assigned.

Decided April 13, 1977

ELDRIDGE, J.:

Appellees have all filed motions for reconsideration. In all respects but one, the points raised have been adequately answered by this Court's opinion, and to this extent the motions are denied.

The one matter raised which is not dealt with in the Court's opinion involves a question of statutory

interpretation. In their motion for reconsideration Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation (PMC) have requested that the mandate of this Court be modified to allow the court below on remand to consider their argument that the Maryland Act is not applicable to PMC. In its declaration, PMC alleged that the term "retail service station" as used in Paragraphs B and C of the Act refers only to retail service stations offering a "full line of automotive services to the motoring public" and that, therefore, those provisions are not applicable to PMC which operates "gas only" service stations. The trial court did not rule on this issue, and since this question was not raised on appeal, this Court did not consider it. However, as this contention involves only a legal issue of statutory interpretation, we shall now consider it instead of remanding for further trial court proceedings. *See* Maryland Rule 885.

Definitions applicable to the entire Motor Fuel Inspection Law, Maryland Code (1957, 1972 Repl. Vol., 1976 Cum. Supp.), Art. 56, §§ 157A-157M, of which the challenged statute is a part, are found in Art. 56, § 157A. Section 157A(6) defines "retail service station dealer" as "any person, firm or corporation maintaining a place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles." In view of this definition of "*retail service station* dealer," it is clear that "retail service station" refers to any retail place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles. The term is not limited to those places which, in addition to selling motor vehicle fuel, also offer automotive services. Moreover, the purpose of Paragraphs B and C is to preserve competition in the retail gasoline market by eliminating what the Legislature determined to be the destructive competition of service stations operated directly by producers or refiners. To so limit the definition of "retail service station" would defeat the purpose of these provisions by allowing producers or refiners to continue to operate retail service stations so

long as those stations did not offer automotive services. Such an interpretation of the statute was clearly not intended by the Legislature. Therefore, we hold that "retail service station" as used in Paragraphs B and C includes stations such as those operated by PMC which sell only motor vehicle fuel.

The appellees have also filed a motion to stay the mandate of this Court. If the mandate were to be issued, the circuit court would be required to dissolve the injunction prohibiting appellants from enforcing the Act. Appellees contend that dissolution of the injunction would require immediate enforcement of the divestiture provisions of the Act by the State prior to possible review and final disposition of this case by the Supreme Court of the United States and would result in irreparable injury. We do not agree that upon dissolution of the injunction, the State will be either permitted or required to enforce the divestiture provisions immediately.

The Act became effective on July 1, 1974. Under Paragraph B, after that date no producer or refiner was to *open* a retail service station operated by company personnel. However, under Paragraph C, producers or refiners were not prohibited from operating retail service stations with company personnel until after July 1, 1975. Thus, the General Assembly provided a one year period from the effective date of the Act in which producers or refiners could convert company operated stations to dealer operation or otherwise divest themselves of company operated stations. The statutory language reflects a clear legislative intent to delay enforcement of the divestiture provisions for one year after the Act becomes operative. The State, interpreting the statute in a like manner, has stated in its answer to the motion that the one year period will be observed in the enforcement of the Act in accordance with the requirements of the statute. Therefore, the divestiture provisions of Paragraph C cannot be enforced until one year from the dissolution of the injunction in the instant case. Consequently, issuance of our mandate

will not result in immediate enforcement of the divestiture provisions of the Act. It should also be noted that under Paragraph H of the Act, the Comptroller may permit reasonable exceptions to the divestiture dates in the event that there is no final resolution of this case prior to the one year divestiture period. Accordingly, we do not find that issuance of the mandate will result in irreparable injury to the parties. The motion for stay of mandate is denied.

Motions Denied.

APPENDIX C

MEMORANDUM

In the Circuit Court for Anne Arundel County

Equity Nos. 22,069, 22,091, 22,216, 22,461, 22,502, 22,551 and 22,562

Exxon Corporation, et al.,
Plaintiffs,

v.

Marvin Mandel, Governor, et al.,
Defendants.

Paragraph D of Chapter 854 of acts of 1974 provides: "Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

Plaintiffs have moved for partial summary judgment, claiming that the provisions of paragraph D are illegal.

Assuming without deciding that the term "voluntary allowances" includes a price reduction to selected dealers, the court believes that there are no substantial facts in dispute on the question of the legal effect of paragraph D, and consequently it is appropriate that the plaintiffs' motion for summary judgment be entertained by the court to the end that this trial be expedited as much as possible.

It is established and stipulated that Plaintiff movants are producers and refiners of petroleum products, and

offer goods and services at retail and wholesale levels in Maryland.

All gasoline and allied petroleum products sold by movants to dealers in Maryland is transported into the State in a continuous flow of interstate commerce from refineries located outside the boundaries of the State.

Under specified market conditions, movants have, and presently do grant temporary price reductions or competitive price allowances to their branded retail dealers within certain geographic areas in Maryland without extending such allowances on a state-wide basis.

Literal enforcement of paragraph D in matters of price allowances would place the plaintiffs in jeopardy of violation of the Robinson-Patman Act passed by the Congress of the United States in 1936 in an attempt to foster fair competition in interstate commerce. Particular exposure of risk would take place in areas where compliance with paragraph D would necessarily impinge upon gasoline sales in neighboring states or the District of Columbia.

Where, as in Maryland, gasoline is neither produced nor refined, it has been held that sales *in commerce* are effected when a dealer is sold gasoline which had been refined by the supplier in a state other than the one in which the sales were made. *Standard Oil Co. v. F.T.C.*, 340 U.S. 231; *Bargain Car Wash v. Standard Oil Co.*, 466 F.2d 1163. Moreover, paragraph D would have the effect of depriving the plaintiffs in Maryland of the absolute defense afforded them by sub-section 2(b) of 15 U.S. Code §§ 13-13B. 21a (1952) when plaintiffs are alleged to have discriminated in price between different purchasers of commodities of like grade and quality.

While it seems clear to the court that Robinson-Patman does not completely preempt the field of gasoline marketing within the several states of the United States, paragraph D of the Maryland Act would unquestionably have the effect of repealing the 2(b) defense in Maryland, and at the same time impose upon

the plaintiffs the risk of conflict with federal policy which has been held to be prohibited to the states as early as 1819 in *McCulloch v. Maryland*, 17 U.S. 316.

> "The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think the unavoidable consequence of that supremacy which the Constitution has declared." *McCulloch, supra.*

As late as June of 1975 in *Connell Const. Co. v. Plumbers and Steamfitters Local*, 43 Law Week 4657, the Supreme Court reiterated that federal law preempts state remedies that interfere with federal policy, especially where substantial risk of conflict exists.

This court finds that the risk of conflict in attempted compliance by the plaintiffs with paragraph D is all apparent, and that this paragraph, would of necessity, foster the lack of lawful competition within the State to the detriment of the consumer. It therefore finds that in obstructing the accomplishment and execution of the full purposes and objectives of an Act of Congress of the United States paragraph D is invalid under the preemption doctrine. *Hines v. Davidowitz*, 312 U.S. 52.

The Plaintiffs' motion for partial summary judgment is therefore granted this 14th day of October 1975.

E. MACKALL CHILDS,
Judge.

APPENDIX D

MEMORANDUM OF OPINION

In the Circuit Court for Anne Arundel County

Equity Nos. 22,069, 22,091, 22,216, 22,461, 22,502, 22,551 and 22,562

Exxon Corporation, et al.,
Plaintiffs,

v.

Marvin Mandel, Governor, et al.,
Defendants.

This litigation was commenced when Exxon Corporation ("Exxon") filed suit against defendants on June 17, 1974 alleging the unconstitutionality of Chapter 854 of the Laws of Maryland of 1974. Plaintiffs Continental Oil Company and Kayo Oil Company ("Kayo") and Shell Oil Company ("Shell") subsequently filed similar suits on June 28th and September 3rd, 1974, respectively. Plaintiffs Gulf Oil Corporation ("Gulf"), Phillips Petroleum Company ("Phillips"), Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc. ("Petroleum Marketing") and Ashland Oil, Inc. ("Ashland") filed bills of complaint on January 23, 1975, February 14, 1975, March 19, 1975 and March 26, 1975, respectively. All of these suits are consolidated for purposes of the trial of this case.

On May 5, 1975 (on July 24, 1975 for Petroleum Marketing), the Court entered an order prohibiting defendants from enforcing against plaintiffs the provisions of Chapter 854 while the instant case is pending

and at the same time prohibiting plaintiffs, while the instant case is pending, from opening and operating service stations with company personnel, personnel of a subsidiary company or a commissioned agent without first notifying the defendants of their intention to do so.

Motions for partial summary judgment with respect to paragraphs D and F of Chapter 854 were filed by Shell and Exxon on May 29, 1975 and by Gulf on June 19, 1975. Thereafter, as a result of the deposition of John K. Coleman, Chief of the Gasoline Tax Division of the Comptroller's office, taken by plaintiffs on July 23, 1975, plaintiffs Continental, Shell, Gulf, Phillips and Ashland filed a joint motion for partial summary judgment as to paragraphs B and C of the statute on August 10, 1975.

After extensive briefing and argument on the motion in open court the undersigned granted the motion for partial summary judgment and ruled that paragraph of Chapter 854 unconstitutionally impinged upon the provisions of the Robinson-Patman Act and especially precluded plaintiffs from availing themselves with the absolute defense afforded under 2(b) of 15 U.S. Code §§ 13-13B, 21a (1952) in the events plaintiffs are alleged to have discriminated in price between different purchasers of commodities of like grade and quality.

Argument and decision as to paragraph F was deferred pending action by the United States Congress in terminating or extending the Federal Emergency Petroleum Allocation Act of 1973.

Plaintiffs continue to seek a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, § 157E of the Annotated Code of Maryland (as amended at the 1975 Session of the General Assembly by Chapter 608 of the Laws of Maryland of 1975 effective July 1, 1975) ("the Act"), is unconstitutional and invalid, and a permanent injunction prohibiting the defendants from enforcing the provisions of the Act against the plaintiffs. All plaintiffs, except Exxon and Petroleum Marketing, (by

their joint motion for partial summary judgment filed on August 10, 1975) seek a declaratory judgment that paragraphs B and C of the Act are not applicable to them or in the alternative are unconstitutionally vague.

The Maryland Act adds the following provisions to Article 56, § 157E (the italic portions are those added by Chapter 608):

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated* by a retail service station dealer.
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an

equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

THE PLAINTIFFS

(As Stipulated Among Counsel)

EXXON

Exxon Company, U.S.A., a division of Exxon Corporation (hereinafter referred to as "Exxon") was formed effective January 1, 1973, and operates the business interests formerly operated by Humble Oil & Refining Company.

Exxon is a company involved in exploration for and production of crude oil and natural gas and in the refining, transporting and marketing, at both the wholesale and retail levels, of a wide range of petroleum products.

Insofar as petroleum products are concerned, operations by Exxon in Maryland are limited to distribution and marketing.

Exxon has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Exxon branded gasoline in the State of Maryland have all of their gasoline supplied from outside the state.

Gasoline sold under the Exxon brand in the State of Maryland normally comes from Exxon's refineries at Baytown, Texas, and Baton Rouge, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Crude oil refined at Baytown normally comes from Texas, Alabama, Florida, and foreign sources. Crude oil refined at Baton Rouge normally comes from Texas, Louisiana, Mississippi, Alabama, Florida and foreign sources.

Gasoline produced at these two refineries is transported to two primary terminals which supply customers in Maryland. These primary terminals are located in Fairfax, Virginia and Baltimore, Maryland. The gasoline is normally brought to the Fairfax terminal by common carrier pipeline, the Plantation Pipeline System, from the Baton Rouge refinery. In 1973, approximately 118,500,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal also supplies gasoline to customers in Virginia and Washington, D. C. The Baltimore terminal is normally supplied from the Baytown refinery by tanker. In 1973 approximately 210,000,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal also supplies gasoline to customers in Pennsylvania, Virginia and West Virginia.

Exxon maintains one secondary terminal in Maryland, at Salisbury. The secondary terminals at Easton and Hagerstown have been closed since Exxon filed its Bill of Complaint. The Salisbury terminal is supplied by barge or tank truck from the Baltimore terminal. In addition, a terminal at Norfolk, Virginia has on occasion supplied Exxon brand gasoline for portions of the lower Chesapeake Bay area of Maryland. The Easton, Hagerstown, Salisbury, and Norfolk terminals accounted for approximately 29,000,000 additional gallons of gasoline to Maryland customers in 1973.

The majority of Exxon brand motor oil sold in Maryland comes from the Baytown and Baton Rouge refineries where the base stock is made. It is shipped by tanker to Bayonne, New Jersey, where it is blended into motor oil with additives, which are made at Bayonne. It is then barged to the Baltimore plant where it is canned and trucked to customers. The vast majority of greases sold in Maryland at Exxon company-operated stores and at various Exxon dealer service stations come from Exxon's plant in Pittsburgh, Pennsylvania.

Antifreeze, spark plugs, tires, batteries and accessories sold at company-operated stations and at various Exxon dealer stations in Maryland are manufactured by other companies at various places outside the State of Maryland and Shipped into Maryland by truck and rail.

Exxon operates four stations in Maryland selling gasoline under the Alert brand. These stations are supplied by refineries, other than those of Exxon, located outside the State of Maryland. Prior to June 4, 1974 the product was acquired primarily from Crown Petroleum Corporation. Since then, the Alert stations have been primarily supplied by BP Oil Corporation.

Exxon does not engage in any producing of motor vehicle fuels in the State of Maryland.

As of December 31, 1973 Exxon branded gasoline was sold at approximately 25,400 retail outlets located in forty-five states and the District of Columbia.

Exxon began marketing operations in Maryland in 1916. Exxon sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail level both in local markets in Maryland and also to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

As of July 1, 1974, Exxon had 36 company-operated stations in Maryland, representing approximately 6.7% of the 532 direct served[1] Exxon branded service stations in Maryland. This represents a decline from 57 company-operated stations in Maryland as of December 31, 1971 or approximately 9.2% of the 620 service

[1] Those service stations operated by independent dealers or by company personnel which receive their product directly from Exxon, as distinguished from those stations which are supplied by companies which purchased Exxon brand gasoline and resold it. The latter companies are generally known as resellers.

stations at that time.[2] As of December 31, 1973, Exxon had 356 stations operated by lessee dealers in Maryland. As of December 31, 1974, Exxon had 326 stations operated by lessee dealers in Maryland. At the end of 1973, Exxon had approximately 140 contract dealers in Maryland. At the end of 1974, Exxon had approximately 133 contract dealers in Maryland.

Exxon currently has 30 branded resellers in Maryland. It has no direct knowledge of the exact number of Exxon branded outlets through which the resellers sell their products or to the extent to which other products and services are offered by those facilities.

Exxon markets its products nationally and in Maryland through a full range of retail facilities. In Maryland, Exxon had 11 Car-Care Centers (one of which is combined with a car wash facility), one full self-service station, one turnpike station, and four limited service stations selling gasoline under the Alert brand. The remainder of the 532 direct served Exxon branded service stations in Maryland as of December 31, 1973 are conventional facilities.[3]

The Car Care Centers in Maryland have from 7 to 12 bays as compared with 2 to 4 bays of the typical conventional service station and the cost of investment is substantially higher. They are specifically equipped and manned for repair and maintenance work. Their service work capability usually includes alignment and front-end repairs, brake work, exhaust system work,

[2] Exxon has traditionally marketed its gasoline primarily through independent retailers and wholesalers rather than through company operations. As of December 31, 1973, Exxon operated with company personnel 933 service stations nationwide. These stations represent approximately 3.7% of the approximately 25,400 Exxon retail outlets. This represents a decline from the 2,731 company-operated service stations as of December 31, 1971 or 9.7% of the then approximately 28,100 Exxon retail outlets.

[3] As of July 1, 1974, Exxon had 123 major service centers nationwide which operate under the logo Exxon Car-Care Center and had 74 full self-service stations nationwide.

tune-up, shock absorber and universal joint replacement, airconditioning service and repair, cooling and heater system service and repair, fuel system work, ignition work, and power train-transmission service. In addition to these maintenance and repair services, the Car-Care Center provides the consumer with a full line of tires, batteries, and automobile accessories. The Car-Care Center concept was developed by Exxon to participate in the expanding market for automobile repair and services. The repair services provided at those Centers are guaranteed at any Car-Care Center in the nation, not just the one which issues the warranty.

The following is a list of specialized equipment found at a "Car Care Center":

1. Start-a-Car Unit.
2. Fuel pump tester.
3. Bearing press package-17 ton.
4. Wheel-puller package including drivers, etc.
5. Brake Shop-combination.
6. Acetylene gas welding unit.
7. ARC welding unit.
8. Custom wheel adapter kit to handle all cars.
9. Grand Prix adapter for ETC-10.
10. Wheel bearing packer.
11. Parts cleaner-air operated.
12. Power washer package complete.
13. Jacks-lifting package.
14. Screw type stand 64" to 83" height 500 lob. rating — used for lifting.
15. Brake stool.
16. Air filter tester.
17. PCV valve tester.
18. Compression tester.
19. Head gasket leak detector.
20. Mechanics stethoscope.

21. Inspection mirror.
22. Brake Analyzer-dynamic.
23. Static front end alignment.
24. Alignment lift.
25. Headlight tester.

THE Chart in Appendix A identifies the initial investment by Exxon in all of Exxon's existing company-operated stations in Maryland based upon dollar values at the time of the original investment by Exxon, broken down according to land, building and equipment. The total investment amounts to $10,059,700.00

The following tables shows the volume of gasoline in thousands of gallons sold through Exxon branded stations in Maryland in 1973:

Total[4]	*Company Operated*	*% of Total*	*Non-Company Operated*[5]	*% of Total*
344,921.9	54,190.0	15.7%	290,731.9	94.3%

The following table shows the volume of motor oil, tires, and batteries sold through direct served Exxon brand stations in Maryland during 1973:

	Total	*Company Operated*	*% of Total*	*Non-Company Operated*	*% of Total*
Motor Oil (gallons)	1,184,100	157,600	13.3%	1,026,500	86.7%
Tires (units)	85,891	11,831	13.8%	74,060	86.2%
Batteries (units)	27,850	4,378	15.7%	23,472	84.3%

[4] Includes 25,280,000 gallons sold by Exxon to resellers in Maryland in 1973.

[5] These figures reflect only wholesale sales by Exxon to non-company operated stations. The dealers at these stations purchase additional quantities of these products from other sources and sell them at retail.

In 1973 Exxon had retail sales at company-operated stations of $928,450 in house brand accessories, and $690,860 in other accessories and had labor revenue of $1,256,801. This is in comparison with wholesale sales by Exxon of house brand accessories to non-company operated stations of $1,110,905. Figures for other accessories and labor revenue at non-company-operated stations are not available to Exxon.

There is presently in force a contract between Exxon Corporation and the Maryland Transportation Authority dated November 15, 1973 for the operation of a gasoline service station at the turnpike facility at the Maryland House located on the John F. Kennedy Memorial Highway. The contract is for a period of five years with a right of renewal for an additional five years. The contract contains the following provisions, among others, concerning the operation of the facility:

a. Exxon agrees to operate the service station in a highly efficient manner, and to conduct its operations in accordance with the highest standards of management for service stations, to the end that the public may be served in the best possible manner and that public esteem may be won for Exxon, its service and products, and for John F. Kennedy Memorial Highway.

b. Prices charged for goods and services sold at the service station shall be no higher than, and the quality thereof shall be at least equal to, the prices and quality prevailing at service stations in the same general vicinity which are owned and operated by oil companies.

c. Exxon shall supply free service at least equal to such service supplied by service stations in the general vicinity which are owned and operated by oil companies.

d. Exxon is to operate the service station 24 hours a day every day of the week. Ample provision is to be made by Exxon for speedy and convenient handling of patronage during all hours.

e. Exxon shall have a sufficient number of trained and uniformed attendants on duty at all times to conduct properly the business of a gasoline service station. All employees of Exxon working on the premises must be thoroughly familiar with the location of interchanges in order to direct motorists intelligently, and they must know the emergency services, including doctors, hospitals, and ambulances, available in the general vicinity of the service area.

f. Exxon is to furnish roadside service for disabled vehicles, including two modern service trucks of good appearance and in first class mechanical condition available 24 hours a day on standby service. Exxon shall perform its duties in such manner as to furnish adequate call service to highway patrons within 20 minutes from the time Exxon is notified. The equipment operators must at all times be courteous and present a clean and neat appearance. They shall obey and respect all rules and regulations of the Authority. The Operator shall encourage each equipment operator to obtain a certificate of completion of the standard 22-hour Red Cross first-aid training course when and if practical and shall permit operators to attend such course during regular working hours without deduction from such operator's pay, when and if arrangements can be made for such training.

The following is a list of innovative marketing concepts of products testified at stations operated by Exxon in Maryland and elsewhere, with an explanation of each concept or product.

1. *Partial self service.* Several years ago Exxon tested self-service operation at one island in a number of company-operated stations in different markets. The experiment lasted for some two or three years. When, in Exxon's opinion, it was found to be successful and the techniques adequately developed, Exxon encouraged dealers to consider partial self-service where legal and suitable in order to enable them to compete for a broader spectrum of customers. Exxon made the program

available to dealers upon request at no cost. Exxon's cost was approximately $750 per station. Among the problems and issues dealt with during this experiment were the following: a) the type of equipment and collection system which is most convenient and acceptable to the motorist; b) the most effective means of communicating to the motorist as he enters the station that one island is self-service and the other is full service; c) special problems which arise in the operation; d) whether credit cards should be accepted at the self-service island; e) the number of customers who convert from full service to self-service. In Exxon's opinion the resolution of these kinds of issues could only be accurately obtained by close control of operating procedures and monitoring of the results, best performed at company-operated stations.

2. *Valucenter advertising and promotion.* The valucenter concept of cooperative advertising and sales promotion was tested at Car Care Centers and after, in Exxon's opinion, proving successful, was expanded to include dealers who wished to participate.

3. *Manning guidelines.* During the gasoline shortage in 1973, new manpower productivity guidelines were developed at direct operated stations and were passed on to dealers, as counseling guidelines, through the sales representatives. These guidelines would, in Exxon's opinion, assist a dealer in controlling his largest expense — manpower — during the time of shorter hours and fewer days and, at the same time, help to maximize customer convenience.

4. *Certification of mechanics.* The National Automotive Institute for Service Excellence (NAISE) and automobile manufacturers decided to certify mechanics through their organization as being competent for repairing automobiles. Initially, this program would have included only mechanics of automobile dealers. As a result of being in the Car-Care Center business, Exxon, with the help of the American Petroleum Institute, was able to get NAISE to expand the program to

include service station mechanics. Further, through the experience of its Car-Care Center mechanics taking the test of certification, Exxon was able to advise its dealers of the kinds of training needed prior to taking the tests and also was successful in getting the certification of mechanics by NAISE broken down into about eight categories of expertise rather than having only one category of Master Mechanic.

5. *Automotive exhaust emission.* As a result of operating Car-Care Centers, Exxon became interested in testing various manufacturers' equipment which is designed to test the exhaust emissions of automobiles. In Exxon's opinion some of the equipment was found to be reasonably acceptable Others were found to have problems. With the help of a research division of Exxon, the Company was able to develop reasonable equipment and procedures for testing exhaust emissions. Subsequently, the State of New Jersey required automobiles licensed in that state to be inspected and adjusted to a minimum level of exhaust emissions. As a result of Exxon's work in its company-operated stations, Exxon was able to qualify quickly all such stations in New Jersey and many of its dealers to the extent that they were licensed by the State of New Jersey to conduct these tests and make necessary adjustments to the customer's car. With about 15% of the service stations in New Jersey, Exxon had better than 50% of those licensed by the State to test exhaust emissions.

6. *In-bay car wash units.* A number of in-bay units were tested at company-operated stations. As a result Exxon was able to advise its dealers as to which pieces of equipment to avoid and which to use and at the same time developed a set of operating guidelines which were made available to dealers.

7. *Add-on air conditioners and tape decks.* Exxon tested the sale of these items at company-operated stores and found that, in Exxon's opinion, they were highly expensive items and that the

degree of expertise needed to actively compete with specialty stores in these items made them non-profitable. As a consequence, Exxon advised its dealers to avoid these items of merchandise.

8. *Exact cash or credit card after dark.* Due to the high incidence of robberies at service stations, the company tested a procedure of accepting only cash in the exact amount of the purchase or credit cards for sales made after dark. This program subsequently was offered to Exxon dealers, and the incidence of robberies at stations which adopted this practice has declined significantly.

9. *Automotive repair and diagnostic equipment.* The company tested various types of repair and diagnostic equipment at Car-Care Centers and planned to recommend types of equipment and procedures to its dealers. Automobile diagnosis at the time of this test was, in Exxon's opinion, a popular item in the marketplace. The dynamometer, a loaded mode diagnostic equipment device, was very expensive and difficult to utilize profitably. Consequently, the company dropped this kind of equipment at company-operated stores and did not recommend to its dealers to participate in this effort. Exxon has tested idle mode diagnostic equipment, and is currently preparing to test muffler diagnostic equipment. Various types of automotive repair equipment have also been tested at company-operated stations, including, for example, those for front-end alignment.

10. *Motor oil vending machines.* Motor oil vending machines were tested at full self-service company-operated service stations. The negative results from the test led Exxon to advise dealers not to invest in machine.

Exxon recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it does, in order to meet competition from other suppliers, temporarily reduce its wholesale price or grant temporary allowances to its

dealers or resellers without making price reductions or allowances throughout the State.

The normal business practice of Exxon is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide.

Some of Exxon's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including, for example, the District of Columbia and West Virginia.

Exxon is not aware of any violations of law by Exxon in the use of any voluntary allowances in the State of Maryland.

It has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications for various reasons.

When Exxon leases a service station facility to a dealer, such Exxon owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Exxon owned equipment, such as identification signs and credit card imprinters, are separately rented to the dealer.

An investigation was conducted on January 29 and 30, 1974 by auditors of the Gasoline Tax Division of the Comptroller's Office, Early W. Bates and Charles C. Downs, to determine whether the allocation of gasoline by Exxon to some 30 stations selected at random by the auditors was fair and equitable. These auditors conducted a subsequent investigation on February 19 and 20, 1974 to review the allocation to Exxon's company-operated stations. The conclusion reached by the auditors upon the completion of their investigations was that Exxon was allocating its supply to dealers properly vis-a-vis its company-operated stations.

CONTINENTAL OIL COMPANY
KAYO OIL COMPANY

The Continental Oil Company (hereinafter referred to as "Continental") is a Delaware corporation which was formed effective October 8, 1920. The duration of its charter is perpetual. The stock of Continental is publicly held and traded. Its principal offices are located in Houston, Texas, Stamford, Connecticut and Ponca City, Oklahoma.

It is a company involved in exploration for and production of crude oil and natural gas and in the refining, transportation of crude oil and natural gas and in the refining, transportation and marketing, at both the wholesale and retail levels, of a wide range of petroleum products.

Continental does not produce or refine petroleum products or motor vehicle fuels in Maryland, nor does it have any independent service station dealers in Maryland. It does not sell branded "Conoco" gasoline here.

The petroleum products which Continental brings into the State of Maryland are refined by it at its Westlake, Louisiana refinery. The petroleum products are then transported through the Colonial Pipeline to Continental's Baltimore Terminal. Continental's products (gasoline and distillates) are sold to purchasers doing business in Maryland as well as to purchasers located in states other than Maryland, such as Pennsylvania, Virginia and the District of Columbia. With respect to the purchasers doing business outside of the State of Maryland, a substantial part of the volume is delivered by Continental by its own trucks or common carriers engaged in interstate commerce.

The petroleum products distributed by Continental within the State of Maryland are received from the Colonial Pipeline, in that no other significant volume of petroleum products are received from any other transportation sources. The petroleum products sold in Maryland through the filling stations operated by Kayo

Oil Company and the petroleum products sold to Continental's wholesale customers at its Baltimore terminal, through the Onco Division of Continental Oil Company, receive no additives at Continental's Baltimore terminal of the Colonial Pipeline. The only additives that are added to Continental's product are pipeline corrosion and oxidation inhibitors which are added at Continental's Louisiana refinery, prior to transportation through the Colonial Pipeline into the State of Maryland.

As of June 30, 1975, Continental employed 225 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 — $3,350,000.00
1972 — $2,650,000.00
1973 — $2,610,000.00
1974 — $3,136,000.00

Continental sold to wholesale purchasers from its Baltimore terminal, excluding petroleum products distributed to Kayo Oil Company, the following amount of petroleum products for the years 1970 through the first seven months of 1975:

1970 — 12,457,000 gals.
1971 — 14,573,000 gals.
1972 — 13,207,000 gals.
1973 — 13,214,000 gals.
1974 — 15,706,000 gals.
1975 — 9,903,000 gals.
(7 mos.)

Continental owns 100% of the capital stock of the Kayo Oil Company (hereinafter referred to as "Kayo") which is a Delaware corporation formed effective April 29, 1965. The duration of its charter is perpetual. Its principal and only office is located in Chattanooga, Tennessee.

Kayo is a gasoline marketing company and, therefore, has neither producing or refining capacity in Maryland or elsewhere nor has it terminals or bulk plants. It is a large private brand retail marketer of gasoline.

Kayo has 80 supervisory districts and each district is under the supervision of a manager. The manager has no staff and no separate or private office. He works out of one of the gasoline stations located within his district. Kayo has 16 area managers (the area manager supervises approximately 5 districts). The area managers have no staff working for them and also operate out of gasoline stations located within the area. Most, if not all, of Kayo's management have worked their way up to supervisory positions through promotions within the organization.

Kayo qualified to do business in the State of Maryland on January 10, 1964. It presently operates 14 filling stations in Maryland. There are six Kayo stations in Baltimore City and eight filling stations located in various other counties in Maryland.

Kayo obtains all of its gasoline which it sells at its retail outlets in Maryland from Continental. The gasoline is distributed to Kayo by Continental from Continental's Baltimore terminal, by means of Continental's trucks and common carriers, after the same has been shipped to the Baltimore terminal through the Colonial Pipeline.

Its Maryland stations were either built by it or were stations purchased and structurally modified to conform to the Kayo system of retail marketing. Kayo's investments in its existing company owned and operated stations in Maryland is as follows, as of June 30, 1975 — $676,525.00. Maryland sales of gallons of gasoline in 1972 were 14,964,980; in 1973, 15,952,928; in 1974, 13,396,566; and during the first half of 1975, 6,550,868.

The comparative sales by Continental to its wholesale purchasers from its Baltimore terminal and the

total number of gallons of gasoline sold by Kayo stations in Maryland are set forth in the following table:

Year	*Continental Sales to Wholesalers*	*Kayo Sales to the Public*
1972	13,207,000 gals.	14,964,980 gals.
1973	13,214,000 gals.	15,952,928 gals.
1974	15,706,000 gals.	13,396,566 gals.

As of June 30, 1975, Kayo employed 85 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 — $500,000.00
1972 — $568,000.00
1973 — $405,000.00
1974 — $310,079.00

SHELL OIL COMPANY

Shell Oil Company (hereinafter referred to as "Shell") is a corporation organized and existing under the laws of the State of Delaware with its principal offices at One Shell Plaza, Houston, Texas. It was incorporated on February 8, 1922.

Shell is a company also involved in exploration for and the production of crude oil and natural gas and in the refining of crude oil, and the transportation and marketing, at both the wholesale and retail level, of a wide range of petroleum products. Shell-branded gasoline is sold at approximately 8,900 direct served retail outlets located in 40 states and the District of Columbia.

Shell has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Shell-branded gasoline in the State of Maryland have all of their gasoline supplied from outside the State. Gasoline sold under the Shell brand in this state primarily comes from Shell's refineries at Deer Park,

Texas and Norco, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Domestic crude oil refined at Deer Park primarily comes from Texas and Louisiana. Domestic crude oil refined at Norco primarily comes from Louisiana.

Gasoline produced at Deer Park, Texas and Norco, Louisiana refineries is transported to two terminals which supply customers in Maryland. These terminals are located in Springfield, Virginia and Wagner's Point, Maryland. The gasoline is normally brought to the Springfield terminal by common carrier pipeline and to the Wagner's Point terminal by tanker.

The majority of Shell brand motor oil sold in Maryland comes from the Deer Park and Norco refineries where the base stock is made.

Shell does not believe that it is engaged in producing, blending or compounding motor vehicle fuels in the State of Maryland. Prior to distribution from Shell's Springfield, Virginia and Wagner's Point, Maryland terminals, additives are injected into gasoline and, in those rare instances when the product quality does not meet specifications, some premium gasoline is added.

All of the petroleum products sold by Shell at retail to the public in the State of Maryland are transported into the State of Maryland in interstate commerce. It markets its products nationally through the full range of retail facilities. As of June 30, 1975, Shell operated 180 tunnel car wash stations, 135 self-serve stations, 15 gasoline-only stations, 4 self-repair stations and 50 conventional full-service stations nationwide.

Shell has traditionally marketed its gasoline through independent retailers and wholesalers rather than through company operations. As of June 30, 1975, Shell operated with company personnel 384 service stations nationwide, representing approximately 4.3 percent of the approximately 8,900 Shell direct-served retail outlets.

As of June 30, 1974, Shell had 1 company-operated facility in the State of Maryland, representing approximately 0.5 percent of all directly operated facilities in Maryland at which Shell-branded petroleum products were sold.

Shell's one company-operated Maryland facility is a conventional full-service station. Shell's initial investment in that station, based upon dollar values at the time of original investment, was $49,285 for improvements, $36,630 for equipment and $12,800 for the 1973 ground lease rental payments; the lease for that property extends through 1988.

As of June 30, 1974, Shell had 196 stations operated by independent lessee dealers in Maryland. Shell currently has 7 branded jobbers in Maryland.

The following table shows the number of company-operated and direct-served dealer operated facilities in the State of Maryland selling Shell branded products for the years 1971 through the first six months of 1974:

PERIOD AS OF

	12/31/71	*12/31/72*	*12/31/73*	*6/30/74*
Company Operated	0	0	1	1
Dealer Operated*	203	206	206	196

* This includes dealer facilities which are either leased from Shell or another or owned by the dealer.

The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in 1973:

Total	*Company Operated*	*% of Total*	*Non-Company Operated*	*% of Total*
148,266,866	1,477,639	1%	146,789,227	99%

The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in the first six months of 1974:

Total	*Company Operated*	*% of Total*	*Non-Company Operated*	*% of Total*
68,558,649	793,104	1.2%	67,765,545	98.8%

The following table shows the volume of tires and batteries sold through Shell branded direct-served facilities in the State of Maryland in 1973:

	Total	*Company Operated*	*% of Total*	*Non-Company Operated**	*% of Total*
Tires (units)	29,279	155	0.5%	29,125	99.5%
Batteries (units)	10,329	25	0.2%	10,304	99.8%

* These figures reflect only wholesale sales by Shell to non-company operated stations. The dealers at these stations may purchase additional quantities of these products from other sources and sell them at retail.

In 1973 Shell's company-operated station had retail sales of $11,044 in house brand tires, batteries and accessories. This 0.6% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

In the first six months of 1974, Shell's company-operated station had retail sales of $7,968 in house brand tires, batteries and accessories. This is 0.7% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

The hours of operation at Shell's company-operated station have been as follows:

Date	*Hours of Operation*
3/1/73-12/15/73	24
12/15/73-1/15/74	18 (6 a.m. - 12 p.m.)
1/15/74-5/1/74	12 (6 a.m. - 6 p.m.) (closed Sundays)
5/1/74	15 (6 a.m. - 9 p.m.) (open Sundays)

Though Shell has only one company-operated station in Maryland, the following is a list and explanation of innovative marketing concepts and products tested nationally at Shell company-operated stations:

Full self-service — This type of retail outlet allows the consumer to perform all required services, including the dispensing of automotive gasoline.

Gasoline only — In this type of outlet, the consumer is offered, by an attendant, only gasoline and other pump island services.

Tunnel car-wash — This denotes an outlet that offers specialized equipment for washing an automobile. Although such equipment may be found in both dealer and company-operated stations due to the large capital investment required.

Self-repair — This type of outlet, which is currently being evaluated by Shell, offers the consumer, in addition to gasoline, all the necessary tools and facilities to repair his own automobile. The customer rents a service bay at a per hour cost and he has use of all tools and instruction manuals. There is also a technician on duty.

Mini-mart — This type of outlet, which is currently being evaluated by Shell, would offer the consumer, in addition to some or all of the traditional services and products, various non-petroleum related products to satisfy his needs.

Motor lab — This type of outlet was based on the viability of certain diagnostic and repair equipment. After thorough testing and evaluation, it was determined that such equipment did not meet marketing needs and standards.

Express oil changer — Through an Express vacuum-stick which removes used automobile oil, the express oil changer allows the customer to perform an inexpensive, clean and fast oil change.

Computerized gasoline pump — This allows a customer to fulfill gasoline, motor oil and car wash and

wax needs at all times and without delay. The pump accepts either cash or credit card for the products and services selected.

Pilfer-proof oil merchandiser — This is a display stand with the capacity to hold 48 quarts of motor oil. Due to its locking mechanism, it dispenses with the necessity of securing the merchandise when the station closes and thus allows for continuous display of the product. It also contains a protected area for a credit card imprinter and a light weight oil can disposal unit.

Autosense — This computer oriented device identifies all automobile repair needs. It improves productivity by releasing mechanics for repairs and eliminates the possibility of human error.

Shell gasoline and motor oil is constantly being tested and evaluated.

Shell recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it has, in order to meet the equally low price of a competitor of Shell, temporarily reduced its wholesale price or granted temporary allowances to its dealers or jobbers without making a general price reduction or allowance throughout the State.

The normal business practice of Shell is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland, or nationwide.

Shell has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications.

When Shell leases a service station facility to a dealer, the Shell-owned equipment at the station is included in the lease agreement.

From January 1974 to September 1, 1975, the sale of gasoline in Maryland and in the United States was regulated by the federal government pursuant to the Emergency Petroleum Allocation Act of 1973 and the regulations issued thereunder.

GULF OIL CORPORATION

Gulf Oil Corporation (hereinafter referred to as "Gulf"), a Pennsylvania corporation, is involved in exploration for and production of crude oil and natural gas and in refining, transporting and marketing, at both the wholesale and retail levels, of a wide range of petroleum products. Gulf-branded gasoline is sold at approximately 18,430 retail outlets throughout the United States. Gulf also has interests in coal, atomic energy and other resources which could become energy producing in the future.

Gulf has done business in Maryland for more than 40 years, and is the third leading supplier of gasoline in Maryland, selling to dealers, wholesalers, the public, and others approximately 9% of all the gasoline sold in Maryland. All of the gasoline sold by Gulf in Maryland is transported into the state from refineries located beyond the borders of the state.

In 1936 Gulf opened its first modern service stations in the Baltimore area. Prior to that time, Gulf had some bulk plants in Maryland and operated on a limited basis at the wholesale and retail levels in the state. At the present, however, insofar as petroleum products are concerned, operations by Gulf in Maryland are limited to storage, distribution and marketing. It does not produce or refine motor vehicle fuels in the State of Maryland. Purchasers of Gulf branded gasoline in Maryland have all of their gasoline supplied from and refined out of state. Gulf-refined products reach the Maryland market as follows:

a. Gasoline from Port Arthur, Texas, and Alliance, Louisiana, enters the State of Maryland via the Colonial Pipeline. Gasoline from Philadelphia, Pennsylvania, enters the State of Maryland either by barge or truck.

b. Three Gulf terminals serve customers in Maryland. These are located at Baltimore and Salisbury, Maryland, and Fairfax, Virginia. The Baltimore and Fairfax terminals are supplied by the Colonial Pipeline.

The Salisbury terminal is supplied via barge from Philadelphia. Customers in Maryland are also served by bulk plants in various parts of Maryland and one bulk plant in Delta, Pennsylvania. Some of these bulk plants are supplied by truck from the various terminals; oth. s are supplied directly by barge from Philadelphia.

c. All motor oils sold in Maryland originate from the Philadelphia refinery, and are shipped by truck to terminals and bulk plants in Maryland, Fairfax, Virginia and Delta, Pennsylvania.

d. All greases are packaged by the Port Arthur refinery and shipped via tanker to Philadelphia, and thereafter by truck to terminals and bulk plants.

In rare instances, upon notification from the State of Maryland that Gulf's product is not in compliance with state-required specifications, Gulf mixes different grades or types of gasoline in order to bring the product into compliance. For example, Gulf may add premium gasoline to regular grade gasoline with too low an octane rating. The product would then be sold as regular gasoline. Also, if the lead content of a small volume of low-leaded gasoline is too high, it may be added to a large volume of low-leaded gasoline, so that the lead content of the resulting product is within specifications.

In 1974, 87,768,000 gallons of gasoline were sold by Gulf service stations in Maryland; in 1973, 82,983,000 gallons of gasoline were sold by Gulf service stations in Maryland.

Gasoline from out-of-state refineries is transported to Gulf's terminals in Baltimore and Salisbury and to bulk plants in various parts of Maryland from which retail gasoline outlets in Maryland and elsewhere are supplied. Some Maryland retail outlets are supplied from out-of-state terminals or bulk plants. Based upon August 1975 crude runs, which are typical, all of the Gulf gasoline sold in Maryland is refined at either Gulf's Port Arthur, Texas, refinery, its Alliance, Louisiana, refinery or its Philadelphia, Pennsylvania,

refinery. More than half of the crude oil processed at Gulf's Alliance and Port Arthur refineries is of domestic origin, with the balance imported from Nigeria or from Cabinda, West Africa. All of the crude processed at Gulf's Philadelphia refinery is imported from Venezuela, Nigeria and Cabinda, West Africa.

Tires, batteries and accessories sold at Gulf retail outlets, both company-operated and dealer operated, are manufactured by companies other than Gulf in various places outside of the State of Maryland and shipped into Maryland in interstate commerce.

The consumer in Maryland is served by various kinds of Gulf retail gasoline outlets. These include 1 major service center, 2 drive-through car wash facilities, 8 stations having in-bay car wash facilities, 101 merchandisable service stations (i.e. full service) 3 full and 12 partial self service stations. The balance of the Gulf retail outlets in Maryland consists of country grocery stores (Ma and Pa) with gasoline pumps, small garages and other diversified businesses with gasoline pumps, these being the facilities that, in Gulf's opinion, fill the needs of the communities in which they are located.

Gulf's position is that it can best serve consumers and itself by using different types of retail gasoline outlets and marketing methods, and the company has in fact, where possible, varied its marketing methods in response to market conditions.

Since approximately 1952 Gulf has marketed its gasoline primarily through independent retailers and wholesalers rather than through company operations.

As of September, 1975, there were approximately 218 independent dealer stations in Maryland buying Gulf gasoline directly from Gulf, of which approximately 109 leased stations from Gulf and 109 own their own stations or lease them from parties other than Gulf. There is one company-operated Gulf station in Maryland. If it is permitted to continue to own and operate retail service stations in Maryland, Gulf anticipates owning and operating approximately 22 retail gasoline

outlets within the next five years.[6] It has refrained from commencing ownership and operation of these stations[7] pending this litigation.

Gulf's experience with company-operated service stations shows that under certain circumstances, company operation is a more efficient mode of direct marketing of gasoline by Gulf. Through direct company operations, Gulf can control hours of operation and service and may respond quickly to price changes in the market. In the opinion of Gulf's management direct company operations can result in significantly lower selling costs per gallon of gasoline than a traditional dealer-operated station. These reductions in selling costs might be passed on to the consumer in the form of lower gasoline prices.

The ability to market through company-operated stations allows Gulf to experiment with innovative, competitive marketing techniques. Such outlets represent an alternative marketing technique, rather than an exclusive mode of marketing. However, in certain circumstances, company-operated stations represent the most desirable and efficient retail technique, from the standpoint of Gulf.

From Gulf's viewpoint, other possible advantages of company-operated stations are:

a. High standards of service and cleanliness.
b. High standards of design; generally attractive appearances.
c. Longer hours of operation to serve the public.
d. Fast "no frills" sales, for that portion of the public which desires them.

[6] Nineteen of the 22 are presently operated by lessee dealers; two are temporarily closed and under reconstruction; and one is already company owned and operated. As to the 19 lessee dealers, Gulf's policy and intention are to attempt to negotiate a buyout of their operations. Any lessee dealers who decline to sell may remain in business as usual.

[7] Except for one station owned and operated since prior to the commencement of this litigation.

Company-operated stations can be used for testing new market techniques. For example, Gulf first tested its "Tire Hut" discount auto, home and garden outlets at company-operated stations outside of Maryland.

In Gulf's opinion Gulf company-operated stations are able to quickly and effectively respond to changing market conditions. During times of shortage, Gulf's control over its company-operated stations would permit Gulf to coordinate hours of operation in order to attempt to lessen the hardship on motorists.

In Gulf's management's opinion the divorcement of Gulf's company-operated station will diminish its value. Furthermore, the provisions of the Maryland Act which prohibit Gulf from operating retail service stations in Maryland will preclude the conversion of any Gulf properties in Maryland to company owned and operated service stations.

Gulf's investment in its existing company-operated station in Maryland is as follows:

Land	$78,510.00
Building	53,424.00
Equipment	33,977.00
TOTAL	$165,911.00

The granting of price differentials and allowances has been a normal business practice of Gulf.

Gulf stations in Maryland serve a market composed of consumers operating both in interstate and intrastate commerce. A sampling of consumers in interstate commerce includes: truckers — Chemical Leaman, Carolina Freight, Eastern Express, Johnson Motor Lines and O'Boyle Tank Lines; railroads — The Chessie System, Penn Central Railroad and Southern Railway System; airlines — Eastern, BOAC, Braniff, TWA, Northwest Orient and National. Maryland borders several jurisdictions — Delaware, Pennsylvania, West Virginia and the District of Columbia. Maryland falls within the Washington-New York-Boston corridor and

lies between the major metropolitan areas of Washington, D.C. and Wilmington-Philadelphia.

Gulf recognizes certain competitive trading areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such trading areas it has, in order to meet competition from other suppliers, granted temporary competitive allowances to its dealers or resellers without granting such allowances throughout the state.

Some of Gulf's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including the District of Columbia, Virginia, Delaware, Pennsylvania and West Virginia.

The normal business practice of Gulf has never included any program whereby it extended temporary competitive allowances "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide. Gulf is not aware of any violations of law by Gulf in the use of any such allowances in the State of Maryland.

When Gulf leases a service station facility to a dealer, such Gulf-owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Gulf-owned equipment, such as identification signs and credit card imprinters, are separately rented to the dealer. Gulf does not apportion the rental for a fully equipped service station between the equipment included in the lease and the real estate.

Gulf has on occasion granted to its lessee dealers in Maryland rental abatements or modifications for various reasons.

PHILLIPS PETROLEUM COMPANY

Phillips Petroleum Company, hereinafter referred to as ("Phillips") is an integrated petroleum company based in Bartlesville, Oklahoma. It is engaged in production, refining, processing and marketing of

petroleum products of all varieties and various derivatives of petroleum. It has six domestic crude oil refineries, all of which are located west of the Mississippi River, two in Texas, one in Kansas, one in Utah, one in Montana and one in California. A subsidiary, Puerto Rico Core, Inc., owns and operates a petrochemical manufacturing plant in Puerto Rico that uses chemical feedstocks but produces some gasoline as a by-product.

The crude oil production of Phillips is mainly in the Mid-Continent region of the United States. There is, of course, some production from foreign sources. This company engages in no crude oil production and has no petroleum refineries within the State of Maryland. All Phillips-branded refined petroleum products available at Phillips-branded stations in Maryland are supplied from outside the State. Insofar as Phillips' operations in Maryland related to refined petroleum products are concerned, Phillips is only a supplier and a marketer. Phillips does lease segregated bulk storage tanks for refined products at the Amerada-Hess terminal in Baltimore.

Phillips was incorporated in the State of Delaware in 1917. At one time it marketed in all of the 50 states, and at present it markets to some extent in all of the states except Alaska and Connecticut. Phillips first began operating in Maryland as a marketer of petroleum products in 1960. It presently is qualified to do business in the State of Maryland and has been so qualified since 1960. Phillips markets its refined petroleum products in Maryland under the principal Phillips brands, such as Phillips 66 Regular, Phillips 66 Premium, and Phillips 66 Unleaded and also under its secondary or private brands such as Way-Lo Regular, Way-Lo Premium, and Way-Lo Unleaded. These trade names or brands are registered federally and also in Maryland.

For purposes of marketing, the company operations are divided into three geographic regions, a Western

region, a Central Region and an Eastern Region, as shown on the map in the attached Appendix. The State of Maryland is within the Eastern Region. In marketing petroleum products, Phillips is a wholesale supplier of gasoline, distillates, motor oils and greases to jobbers, dealers and ultimate consumers.

Phillips also is a wholesale supplier of tires, batteries, accessories and sundry items of merchandise. Phillips also is a retailer of the same products and also service work in Phillips-branded, salary-operated service stations. In some situations, Phillips retails all of these items except service work, and in some instances, except tires, batteries and accessories, in secondary or private branded stations.

During the period January 1, 1969 to date, substantially all of the automotive gasoline marketed by Phillips, other than through its own salaried service stations, was marketed by selling to independent businessmen or companies that are not employees or agents of Phillips. Phillips has been basically a jobber-oriented company, by which is meant that it historically has sold its branded products to wholesale distributors (jobbers) for resale through their own service stations or to independent dealers operating service stations. Phillips does sell some of its refined petroleum products directly to some of the independent dealers.

Jobbers are independent businessmen or companies who purchase petroleum products directly from Phillips and either market them through their own facilities or resell to their wholesale consumers or their dealers for further resale to retail consumers. Nationwise through the years 75% to 80% of Phillips products have been sold to jobbers. Today about 67% of all gasoline which Phillips sells in Maryland is sold to jobbers. Approximately 17% is sold directly to the public through Phillips-salaried service stations, and about 16% is sold directly to independent dealers who also are usually independent businessmen who employ one or more

people either on a part-time or full-time basis to operate a one or a multi-bay service station offering a line of gasoline and other petroleum products and allied services and items within their discretion.[8] Some of these dealers own their service stations, but most lease their service stations either from Phillips or from Phillips jobbers or third parties.

Nationwide, during the 1969-1973 period, the ratio of salary-operated service stations to the total number of retail outlets for Phillips products varied from a high of about 5.4% to a low of 1.6% during such period. In Maryland, for this same period, the ratio of salary-operated service stations to the total number of retail outlets[9] varied from a high of 14.05 percent to a low of 7.88 percent. Appendix B contains a statement of the approximate number of outlets for Phillips products operated during 1974 within the various geographic regions and the percentage thereof that were salary-operated by Phillips.

In Maryland at present, there are approximately 121 retail outlets for Phillips products, of which 13 are salary-operated units. Nationwide, there were on

[8]

	1973		*1974*	
	% of Business	*Gallons*	*% of Business*	*Gallons*
Salaried Operations	20.16	7,364,690	17.2	5,077,551
Direct Dealers	17.34	6,335,444	15.89	5,520,253
Jobbers	62.50	22,837,487	66.91	23,245,570
Total	100.00	36,537,621	100.00	34,743,334

In 1974 Phillips salaried service stations and direct dealers (i.e. independent dealers buying refined petroleum products directly from Phillips) shared a smaller percentage of the refined petroleum products sold directly to the public than in 1973; correspondingly, the percentage of sale by jobbers increased.

[9] The number of the total retail outlets for Phillips products is an approximate figure, both for Maryland and nationally. For the reasons for the unavailability of accurate figures, see next paragraph.

November 25, 1974 approximately 17,000 total retail outlets for Phillips products of which number exactly 1,043 were salary-operated units. A precise total as to the number of salary-operated units can be given because these are a matter of company record and are under Phillips' immediate control. Phillips cannot at any time be absolutely certain as to the total number of outlets throughout the country or within any individual state because it does not control the entrance into business or the exit from business of dealers who sell petroleum products under the Phillips signs, but who have their contracts with jobbers and not with Phillips, nor can it control the number of jobber-operated stations. Phillips leases to jobbers a quantity of Phillips signs and credit-card imprinters, and the jobbers utilize these within their sole discretion in putting new dealers in business. Jobbers can acquire new dealers or open stations with their own employees at any time without any prior notice to Phillips or without any control by Phillips over such acquisition or any later termination of the dealers. It would take a day-to-day count of these locations as actually in place and operating for Phillips to be able to ascertain with even approximate accuracy the number of outlets selling Phillips products on any specific day.

Of the 1,043 company-operated outlets, which include 13 Maryland outlets, some sell Phillips' principal brands, only and others sell secondary brands, only. The ratio between these categories varies almost daily. Nationally, from 1969 to 1973 Phillips' distribution of branded product by sale to wholesale distributors for resale decreased from 54.2 percent to 48.2 percent, while unbranded sales to wholesale distributors increased from 16.5 percent to 24.8 percent. To the contrary, in Maryland during the same period of time branded sales increased from 53.7 percent to 62.5 percent, but there has never been any unbranded sales by Phillips to wholesale distributors in Maryland.

An appreciable number of the service stations operated by jobbers or by jobbers' dealers are either owned in fee by the jobbers, or leased by them from Phillips or from third parties. Phillips exercises no control over the day-to-day operations of the independent dealers whom it supplies directly or over the independent jobbers. Where real estate leases are in effect, there are, of course, some limitations and some requirements related to use of the premises. In all instances, there is some control exercised as necessary to protect quality of products, to avoid adulteration of products, and to protect brands. The setting of retail prices at stations operated by jobbers, direct dealers or jobber-dealers is at the sole prerogative of the jobber, direct dealer or jobber-dealer.

All of Phillips' petroleum products move into Maryland in interstate commerce. The tires, batteries and accessories sold in Phillips' salary-operated service stations in Maryland also come into such state in interstate commerce.

At present, of the approximate total of 121 marketing outlets in Maryland for the retail sales of Phillips' brands of gasoline and other petroleum products, approximately 108 are service stations operated by persons or companies who are not Phillips' company personnel, subsidiaries, or commissioned agents, but who buy gasoline and other petroleum products from Phillips for wholesale or retail sale. Eighty-eight of these stations are operated by jobbers or by dealers of jobbers, and the remaining 20 are operated by dealers supplied directly by Phillips. The other 13 service stations within Maryland are operated by salaried personnel of Phillips, with 10 selling only Phillips' principal brands and three selling only Phillips' secondary Way-Lo brands.

At the present time Phillips owns in fee only five service station properties in the State of Maryland. All five are leased directly to dealers. Phillips presently leases from others 44 service stations in Maryland of

which it subleases 17 to jobbers and nine to direct dealers, operating 13 with its company employees. Five of these leased stations are presently vacant or are being rented by third parties for other purposes than retail marketing of Phillips' products. The following is a resume of Phillips' investment in marketing properties in Maryland.

Phillips service station investment	$1,348,858.88
Phillips loaned equipment investment[10]	150,201.20
Phillips TBA lube warehouse investment[11]	19,641.72
TOTAL	$1,518,696.80

The above are net figures as of a time within the last six (6) months as to each property, after deducting depreciation; initial investments were greater.

Attached hereto as Appendix C[12] is a list of the thirteen (13) Phillips service stations operated in Maryland by Phillips personnel. The list includes the company station number, the type of operation and approximate net investment of Phillips. The "Private Brand Express" label identifies the three secondary brand, Way-Lo, stations which are not full-service stations. The "Vanguard" label identifies the other ten which are operated as Phillips branded units. Seven (7) of the stations are leased under long-term lease by Phillips from outside parties who own or lease the land and own the improvements. Phillips' net investment as to these is usually minimal because it normally involves only equipment. One station is located on leased land and is improved with service station improvements owned by Phillips. The remaining five (5) stations are leased by Phillips from a lessor with whom there is an agreement that Phillips must hold

[10] Phillips loaned equipment investment consists of equipment, such as car-lifts and storage tanks, loaned to consumer accounts.

[11] Phillips TBA lube warehouse investment represents warehouse facilities only.

[12] The total net investment reflected in Appendix C is a part of, and included in, the total investment figure of $1,518,696.80 reflected in the preceding paragraph.

such party harmless from any loss on the investments. There is an additional $527,239.37 invested in these properties by such lessor. In all instances the investment figure is after deduction of depreciation.

PETROLEUM MARKETING CORPORATION AND COMMONWEALTH OIL REFINING COMPANY, INC.

Petroleum Marketing Corporation (hereinafter referred to as "PMC") is a Delaware Corporation qualified to do business in the State of Maryland and Commonwealth Oil Refining Company, Inc., is a Puerto Rico Corporation (hereinafter referred to as "Commonwealth").

Commonwealth, a company organized in 1953, is directly engaged in the refining of petroleum products and, through subsidiary corporations and joint ventures, is exclusively engaged in the production of petroleum, aromatics, and other petrochemicals and petroleum products. These activities are carried on at a petroleum refinery and petro-chemical complex located at Penuelas, Puerto Rico. It is totally dependent upon foreign sources for its crude oil supplies. Commonwealth has no plant or facilities in the State of Maryland.

Since 1970, Commonwealth has marketed gasoline, motor fuels and lubricants through PMC which, in June, 1975, was operating 123 retail gasoline stations, under the federally-registered trademark "SCOT" in the Middle Atlantic and Northeastern States.

PMC has been engaged in the sale of petroleum products at wholesale and retail in the State of Maryland since 1955. It conducts retail sales of gasoline and other petroleum products in intrastate and interstate commerce through 20 gas-only outlets and one commissioned-agent relationship, which sells gasoline at wholesale and retail, located in the State of Maryland, as indicated on the map (Appendix D); PMC employs 196 persons at its Maryland retail facilities.

PMC does not change or alter the molecular structure of the refined products that it distributes in any of its facilities, storage tanks or stations in the State of Maryland. The products that PMC handles and distributes either for itself or others, enter PMC facilities from its supplier, Commonwealth, and leave in their original form.

All "SCOT" retail facilities in the State of Maryland are company-owned and company-operated by PMC. It has traditionally attempted to sell gasoline and motor oils in Maryland at a price less than those generally charged by major oil companies. "SCOT" retail outlets do not provide services such as repairs, oil changes, and greasing, available at most service stations. "SCOT" retail facilities do not sell tires, batteries or other accessories available at most service stations.

Beginning in April of 1970 when PMC was acquired by Commonwealth, it has purchased the major quantity of the gasoline offered for retail sale at its 20 Maryland "SCOT" retail facilities from Commonwealth. In recent months, the price of gasoline purchased by PMC from Commonwealth has increased.

Commonwealth and PMC have only the stated business relationship with "SCOT" retail gasoline outlets in the State of Maryland; neither company has any dealership or franchised arrangement at any "SCOT" retail outlet.

ASHLAND OIL, INC.

Ashland Oil, Inc. (hereinafter referred to as "Ashland") is a Kentucky corporation with its principal offices at P.O. Box 391, Ashland, Kentucky, 41101.

Ashland Petroleum Company, is a wholly owned subsidiary of Ashland Oil, Inc., primarily engaged in the business of refining crude oil and the transportation and marketing of petroleum products. Ashland does engage in some exploration for, and production of, crude oil. However, Ashland's crude production (approximately 30,000 barrels per day in 1974) represents less

than 15% of the crude oil which it refines daily in its refineries. Ashland purchases 85% of the crude oil used in its refineries from sources it neither owns nor controls.

Ashland has seven crude oil refineries with an aggregate refining capacity of approximately 385,000 barrels per day. These refineries are located in the Eastern and Upper Midwestern regions of the United States: two are in Kentucky, two are in Ohio, one is in Minnesota, one is in New York and one is in Pennsylvania.

Ashland engages in no crude oil production and has no petroleum refineries within the State of Maryland. Its operations in Maryland are limited to the supplying and marketing of petroleum products.

None of the petroleum products which Ashland supplies or markets in Maryland comes from an Ashland refinery. All of the petroleum products sold in Maryland, either to an Ashland customer or through an Ashland owned filling station, are purchased from another oil company through exchange agreements. All of the petroleum products sold by Ashland at retail in Maryland are transported into Maryland in interstate commerce.

Ashland owns its stations, and operates with company personnel only at 17 locations in Maryland, under trade names "Redhead," "Bi-lo" "Payless," and "Hi'Fi." Of these 17 stations, seven are in the Baltimore vicinity; the others are located in White Marsh, Aberdeen, Laurel, College Park, Cambridge, Cumberland, Adelphi, Suitland, and Salisbury. These "gasoline-only" stations, either have no service or carwash bays, or have them sealed off. They do not sell tires, batteries, or accessories, and have no travel maps or other traveler aids. Ashland does not provide credit cards to these stations and engages in no advertising of the brands Redhead, Bi-Lo, Payless, or Hi-Fi.

Ashland does not market gasoline at retail in Maryland at any other facility other than those listed

above. Ashland, has never sold gasoline in Maryland through independent retailers known as "branded" dealers or "lessee" dealers. No gasoline is sold in Maryland under the "Ashland" brand. Ashland has owned and operated company-owned filling stations in Maryland continuously since 1961.

Its investment in the above filling stations as of September 30, 1974, was $2,381,385.

The following table sets forth Ashland's volume of sales of gasoline in Maryland in gallons through its 17 filling stations during 1971, 1972, 1973 and 1974.

1971	20,255,934
1972	25,989,410
1973	30,498,150
1974	26,959,471

The normal hours or operation for Ashland's stations are 6:00 A.M. to 12:00 P.M. each day. It employs approximately 220 persons in its marketing operations in Maryland.

In states other than Maryland, Ashland markets petroleum products through 699 company operated stations and 640 independent leased "dealer" stations. Of the company operated stations, 698 are gasoline only stations, of which 193 are self-service, and one is a conventional service station. Of the 640 dealer stations, none are gasoline only; all are conventional stations.

THE DEFENDANTS

The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland.

The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland.

The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations.

Plaintiffs have no adequate remedy at law.

An actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and any other relief deemed proper by the Court.

DEFINITIONS

The following definitions are accepted for purposes of construing Chapter 854 of the Laws of Maryland 1974 in connection with this litigation only.

a. Retail service station dealer is defined in § 157A of Article 56 and means any person, firm or corporation maintaining a place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles.[13]

b. Motor vehicle is defined in § 135 of Article 56 and means all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors, upon the public highways, and in the case of vehicles propelled by Diesel fuel or fuel oil, shall mean all such vehicles licensed to operate upon the public highways.

[13] Petroleum Marketing and Continental Oil do not accept this definition.

STIPULATION OF GENERAL FACTS

Legislative History of Chapter 854.

By letter dated June 13, 1973, Governor Marvin Mandel formally requested Louis L. Goldstein, Comptroller of the Treasury, to conduct a study of gasoline retailing in Maryland to determine whether the shortage of petroleum products experienced in the State was real or contrived by plaintiff and other refiners, suppliers or marketers and to determine whether company-operated stations received more favorable allocations of gasoline than did independent dealers.

Pursuant to the Governor's request, a survey questionnaire requesting information on price changes, supply and allocation quotas, hours of operation, "voluntary allowances" and other types of "dealer aid" and sales limitations to customers, was prepared by the Gasoline Tax Division of the Comptroller's Office under the direction of Arthur E. Price, Chief Motor Fuel Inspector, and mailed on June 29, 1973 to 4,055 gasoline service station dealers within the State of Maryland.

One thousand four hundred seven questionnaire returns, completed in whole or in part, or 34.7 percent of the 4,055 service station dealers sent questionnaires, were received by the Gasoline Tax Division. Based on comments received in those questionnaires, follow-up investigations were conducted involving approximately 100 dealers. The responses were tabulated on work sheets and a summary table entitled "Recap by Brand" was prepared. From the Recap and Work sheets, a written analysis of the survey results entitled "Results and Analysis of Service Station Dealers Questionnaire" was prepared by Arthur Price. This analysis was submitted to Governor Mandel for his consideration on September 6, 1973.

Pursuant to the Governor's request of June 13, 1973, the Gasoline Tax Division of the Comptroller's Office prepared and mailed on July 17, 1973 a questionnaire to twenty oil companies in order to evaluate further the

aforementioned request of Governor Mandel. This questionnaire requested information on company activity within the State of Maryland in the areas of: retail service station operations; new and planned service station construction; past and projected sales volumes; allocation formulas; closing of various types of stations; cancellation and/or nonrenewals of contracts; price increases to customers; elimination of voluntary allowances, rental abatements or other "dealer aid;" company policy regarding hours of operation of its branded service stations; and acquisition of new toll-road accounts for the period of June 30, 1972 through June 30, 1973.

Eleven oil companies responded, in whole or in part, to the oil company questionnaire. A written analysis of the survey results entitled "Analysis of Major Oil Companies Questionnaires," was prepared by Arthur Price and John K. Coleman. This analysis was submitted to Governor Mandel for his consideration on September 28, 1973.

A written report entitled "Analysis of Comparative Report of Taxable and Exempt Gasoline Sales for the Calendar Year 1971, 1972, and the First Six Months of 1973" was submitted to the Governor by the Comptroller on September 6, 1973. This analysis was prepared from the computer data collected by the Gasoline Tax Division.

At the instruction of the Comptroller, John K. Coleman, Gasoline Tax Division of the Comptroller's Office, drafted a bill purportedly to correct certain alleged inequities said to be based on the returns of the survey questionnaire sent to the retail service station dealers. The returns purportedly formed the basis for the report entitled "Results and Analysis of Service Station Dealers Questionnaire" which had been submitted to the Comptroller and sent to the Governor on September 6, 1973. A draft of the bill was sent to the Governor by Comptroller Goldstein on September 13, 1973.

After several discussions with the Governor and his staff, Comptroller Goldstein, by letter dated January 7, 1974, forwarded proposed legislation to the Governor's Office prohibiting producers, refiners, and wholesalers of petroleum products from operating retail service stations, requiring all such entities to extend all voluntary allowances and equipment rentals uniformly to all dealers throughout the State.

Identical bills (House Bill 918, by Delegate Bonvegna and Senate Bill 465, by Senator Pine) were introduced in the two houses of the General Assembly during the 1974 session. These bills were the same as the draft bill prepared by John Coleman. Both the House and Senate bills were amended to limit the prohibition on the operation of retail service stations to producers and refiners, by deleting the term "wholesaler." In addition, paragraph G was added to both versions of the bill permitting the Comptroller to adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer operated station. In addition, paragraph H was added to Senate Bill 465 permitting the Comptroller to grant exceptions to the divestiture dates specified by the statute.

Public hearings were held by both the Senate and House committees considering these respective bills. At the public hearing on S.B. 465 before the Senate Committee on Economic Affairs held on February 20, 1974, a total of 16 witnesses registered to appear and testify on the bill. Eight (8) opponents represented the following companies or associations: Exxon Corporation, BP Oil Corporation, Shell Oil Company, Southern Maryland Oil Co., Wise Petroleum Co., Blue Ridge Oil, Maryland Petroleum Association and Maryland Oil Jobbers Council. And a total of eight (8) witnesses appeared and/or registered to testify as proponents of the bill, including the Honorable Louis L. Goldstein, Comptroller, who testified and submitted copies of his Office's aforementioned reports to the Governor and to

the Economic Affairs Committee for their review and consideration. At the public hearings on H.B. 918 before the House Economic Matters Committee held on March 7, 1974 a total of seven (7) witnesses registered to appear and testify on that bill.

Both bills were passed during the 1974 Session of the General Assembly, and Senate Bill 465 which eventually was to be signed into law was passed by a vote of 26-0 (17 absent — no votes), and in the House by a vote of 90-15 (37 absent no votes).

Prior to signing the bill into law, the Governor held a special veto hearing on S.B. 465 and H.B. 918 at which time he invited and received for consideration the views of both proponents, as well as opponents of the legislation. At this special hearing before the Governor, which was held on May 29, 1974, a total of fifteen (15) witnesses appeared to testify on S.B. 465, of which number, seven (7) witnesses registered to appear and testify as opponents of the bill, representing five (5) oil companies, and the business community. Eight (8) witnesses registered to appear and testify as proponents of said bill. Senate Bill 465 was signed into law by Governor Mandel on May 31, 1974 and became Chapter 854 of the Laws of Maryland of 1974.

Chapter 854 of the Laws of Maryland was amended during the 1975 Session of the Maryland General Assembly by Senate Bill 797 which was enacted into law as Chapter 608 of the Laws of Maryland of 1975, adding to paragraphs B and C of the statute a further prohibition on operation of service stations by a producer or refiner under a contract with any person for management of a service station on a fee arrangement. The amendment requires that service stations be operated by a retail service station dealer.

Retail Marketing in Maryland

The consumer in Maryland is served by various kinds of gasoline service stations or outlets in terms of the products and services offered. They include major

service centers, combination service station-car wash facilities, turnpike stations, truck stops, conventional service stations, limited service operations offering gasoline but no other driveway services, and full and partial self-service stations.

Retail stations are operated under various arrangements. There is the direct retailing of gasoline by the supplier, which the law being challenged in this suit would prohibit insofar as that supplied is a producer or refiner of petroleum products. Such direct retailing occurs through operation of the supplier's facility by the supplier's employees, or by employees of a subsidiary company or division. The other major category of retail marketing is performed by independent dealers who operate service stations and resell gasoline sold to them by a supplier. Some individual dealers own their own service stations or lease them from a non-supplier and have a supply contract with a branded or unbranded supplier; others lease a station from a supplier who also supplies them with product.

According to the records of the Gasoline Tax Division of the Comptroller's Office, there were approximately 3,995 retail stations in the State of Maryland on December 31, 1972, 3,798 retail stations on December 31, 1973, and 3,757 retail stations on July 1, 1974.[14]

While there are various types of retail gasoline stations in the State of Maryland, generally they can be divided into two types: (a) major brand stations and (b) private brand stations. The general characteristics of a major brand station are that the brand name is advertised, repair services are generally performed, credit cards are usually accepted, and historically the emphasis is on methods of non-price competition, i.e. service, credit, games, give-aways, etc. The general characteristics of a private brand station are that the brand itself is generally not advertised, limited or no repair services are provided at the station, generally no

[14] Appendix E lists the number of stations in Maryland operated by producers or refiners.

credit cards are accepted, and the emphasis on the price of gasoline is usually greater than the price at major brand stations, since it is generally lower. While there are examples of service stations that do not fit exactly into these categories, the vast majority of stations do. The majority of major brand stations are operated by independent service station dealers. The majority of private brand stations are operated on a company-operated basis, that is, the company that owns the brand name (even though not advertised) runs the station with its own employees.

Retail petroleum marketing in the State of Maryland is and has been a highly competitive industry. This is a result of the number and location of available facilities, the comparatively small capital costs for entering the business, the mobility of the purchaser at the time of purchasing the products, the relative interchangeability of one competitor's products with another in the mind of the consumer, the visibility of price information, and the many choices the consumer has in terms of prices, brands, and services offered.

The first witness offered by plaintiffs was Richard T. Harvin, Retail Sales Manager of Exxon for its Eastern Sales Region. He had been with the company for 13 years in a number of capacities. He stated that the major petroleum brand marketers such as Exxon market their products in many different ways in an effort to attract the wide range of consumer preferences, ranging from full-service stores offering repair facilities to self-service outlets, selling the product only with a minimum of personnel and the resulting saving is passed on to the consumer, the trend being to multi-pump operations with limited service.

In this manner his company seeks to monitor customer preferences and to meet them. Presently, Exxon-branded stores are widely advertised, usually accept credit cards, and provide a degree of repair facilities. On the other hand, its Alert stores, its private brand outlets, merely sell gasoline and motor oil for cash and provide no repairs.

Its dealer-operated stores fall into two categories. One is where Exxon owns or leases the stations and operates through lessee-dealers. The other category is where Exxon neither owns the real estate, nor the improvements. These are known as contract dealers. Exxon has approximately 356 of the former and 150 of the latter in Maryland. Additionally, there are 32 branded company operations here and 4 Alert stations in the state. In these outlets Exxon's management makes all marketing and operational decisions. The trend of the company-operated outlets has been declining in recent years.

One example of a company-operated facility is known as a car-care center which compete with mass-merchandisers, department and tire stores offering repairs. One of the features of such outlets is the USA Guarantee, which when issued will be honored at any Exxon car-care center anywhere in the nation. The investment in such centers can range up to one million dollars, and Exxon feels that in order to standardize performance to be able to issue the guarantee, these centers must be company-operated.

While Exxon now has 94% of its stations operated on a dealer basis, it has no plans to change this position. It has not terminated dealers for the sake of converting to company-operated outlets. However, it feels essential, at least for innovation and monitoring purposes, that some of its outlets be company-operated at all times so as to obtain first-hand experience in customer purchasing trends, to enhance dealer operations and to make a retail profit. It realized $700,000 from its Maryland retail operations in 1974.

Another important feature from Exxon's viewpoint is its ability to enter into a new market area with company-operated stations. Traditionally, until a brand name is established it is difficult to obtain lessees willing to risk their own capital on a product which may not gain acceptance. Florida was an example of this in 1962, where the company was compelled to

operate for approximately four years before a sufficient volume of sales was built up to enable lessees to earn a living wage. Such stations serve as training grounds for dealers and employees who in turn enter into their own operations. The ability of a company to operate stations provides continuity to a community of consumers in the event of the death of a dealer or his sudden leaving of the location. Exxon also operates an outlet on the Kennedy Expressway under contract with the Maryland Transportation Authority.

The witness was of the opinion that paragraphs B & C of the Act would preclude Exxon from operating any of its own retail stores in Maryland. It would be prevented from locally monitoring the gasoline and related retail trade here; from realizing a profit from its investments in the state; from building and operating car care centers here and issuing nationwide guarantees on repairs. It is unlikely that Exxon could obtain a fair return from the rental of its car-care centers, and in the case of the Alert stations the anti-trust provision of the federal regulations might preclude them from leasing to dealers.

As to paragraph F, he stated that fuel allocation nationwide is controlled by the federal government, and Exxon has been in full compliance with the formula with no distinction made between company-operated outlets and dealerships. He felt that paragraph F was in conflict with the federal regulations in that the federal acts contain provisions for hardships, redirectives, state set-aside programs and priorities in users, while the Maryland act is devoid of such provisions. Moreover he could not determine what a "period of shortage" is as used in the Maryland act, since it was not defined in the law.

On cross-examination, he stated the trend away from company-operated stations was economic, since the company had assumed a greater share of the costs of social obligations to its employees. When an outlet was shown to be unprofitable to Exxon for a term, it was

converted to a dealer, or "surplussed out." Maryland is a good market for Exxon, and that is one of the reasons the car-care centers were tested here. Alert stations do not sell Exxon gasoline, but petroleum products exchanged from B.P. (British Petroleum Oil, Inc.). Exxon allots a sum of money for loans to dealers going into service station dealers. There is no difference between cost of gasoline going to a company owned station and a dealer-lessee station. Exxon did not initiate the self-service concept. That was a product of the private brand market where it is still used. The witness also went into the method of allocation under the F.E.A.

Jack William Chandler, president of Kayo Oil Company since 1965, testified that he started with Kayo's predecessor, Kendall, in 1955 as an airplane pilot when Kendall had approximately 99 stations. The founder, Mr. Kendall, had been a jobber in petroleum. He foresaw the need for another method of marketing, and branched into low-price operation with five or six stations, usually selling directly from a railroad tank car stationed on a spur track. Such an operation was the origin of Spur, one of the recognized private-brand leaders.

Kayo never at any time had dealer stations, and found it an absolute necessity to control its own sales to the public. Kayo was purchased by Continental and now has 610 stations nationally, with 3000 employees. Of them, 14 are in Maryland. Its operations are as different from Exxon as it is possible to be.

A typical private-brand station is characterized by a large price sign. The brand name is minimized. The location is secondary, generally removed from prime sites with a limited space on its driveway. There are no service bays and no credit card facilities. Usually, there is one attendant with a moneychanger, and no more than three other attendants without special training, two attendants per shift. No road maps are offered, and no service or sales of automotive supplies. Such a

station is usually open sixteen to eighteen hours a day, seven days a week, including holidays. There is no advertising. The operation is managed by a supervisor for each seven or eight stations. His office is typically in a converted lube bay of a station taken over from another operation. There is no staff or secretarial help. Kayo's home office is a converted warehouse in Chattanooga. All of its managerial staff have risen through the ranks of its employees.

Historically, Kayo and other private-brand marketers have sold gasoline three to four cents below the prices offered by Exxon, Gulf, Shell, Texaco and the like — the major brands — because of the resulting low overhead of the private marketers. It is their only means of survival.

On being referred to paragraphs B & C of the act, the witness stated that had such a law been in effect when Kayo came to Maryland, it could not have entered this market, the reason being that in order to exist company-operated stations are mandatory. If the law were to go into effect, Kayo would be compelled to liquidate its holdings and leave the Maryland market.

On cross-examination Mr. Chandler admitted that he knew of no such decision on the part of Continental's board, but it was the decision of Kayo's directors. He was sure that Continental would not wish him to operate unprofitable stations. Kayo had tried a quasi-dealership operation in Chattanooga, and within three weeks it was a fiasco.

Portions of the depositions of Messrs. Charles King and J. D. Campbell, vice president of marketing and general manager of retail sales of B.P. Oil, Inc., respectively, were then introduced into evidence. Generally it was shown that B.P. decided to convert its dealership organization into a "gas and go" operation in the summer of 1973.

B.P. is a wholly-owned subsidiary of Standard Oil of Ohio. It had been Sinclair previously, operating stations from Maine to Florida, and two refineries.

After a merger with Arco, the U.S. Justice Department intervened, and a separation took place. British Petroleum and Sohio divided the properties and B.P. took over the Sinclair properties. To its dismay, it found the venture unprofitable. It sold off New York City, the Carolinas, Georgia and Florida properties and set out to become profitable from Virginia to Maine.

After spending some $50,000,000 in conventional stations in 1971 and 1972 it was noted that no improvement resulted. The company was encountering zoning and purchasing problems, and a number of failures. After losing $150,000,000 in four years in the conventional field, it was determined that drastic measures were indicated. It was decided to turn to "gas-and-go" as the result of a study of the situation.

The Baltimore area was no exception to the overall picture, although it could not be entirely segregated from the rest of the region. However, it was noted that only 10% of its gasoline sales are through gas-and-go outlets. The balance is still through independent marketers and jobbers. The experience of the independents, selling gasoline only, led them to believe a profit was thus to be made. Supply was then thought to be no problem. When it developed to constitute a problem, BP cut off many of its non-contract purchasers until the FEA allocation system was enforced.

BP determined in 1973 that 27 Baltimore locations would be suitable for gas-only locations. Since then the number has increased to approximately 35. Other BP dealers were offered various alternatives in event of displacement. They could become managers of gas-only facilities or could transfer to other locations at company expense. Those who decided to leave had their inventory and equipment purchased by B.P. Those who owned their own facility continued to receive supplies from the producer. Some 200 stations were sold to jobbers. Approximately 150 dealer stations remain.

Prices at gas-only stations are determined by competitive resale prices in the trading area, and can vary from

place to place depending upon competition prices, cost of operation, and the supply of gasoline available. The profitability of such a station varies in direct proportion to the volume of gasoline sold. The saving feature results from low overhead expense and a portion of the economy effected is passed to the consumer, generally from two to three cents per gallon below branded major prices which attracts the price-conscious customer. Prices at such stations approximate the price at outlets run by unbranded independents.

It is the theory of B.P.'s management that gas only stations would not operate as profitably under independent dealers who would be free to set their own working hours and days. Strict control of hours and prices enables such marketers to maximize volume sold. The concern that B.P.'s changes might cause branded majors to respond in a manner harmful to the market has not been justified.

Relying upon his experience as regional manager for Sohio in Toledo, Mr. King testified that in his opinion the company-operated stations of Sohio for a least 30 years have been a benefit to the consumer in maintaining lower prices, more convenient hours of operation, and setting higher standards of housekeeping. The price maintenance factor results when the company-operated station mark-up for regular gasoline was between seven and eight cents which coincided with prices in dealer-operated stations. With the advent of the oil embargo, dealers have tended to increase their mark up to ten cents while the company stations generally have not. Even so, the company-operated stations have not driven dealers out of business.

Theodore Levitt, Professor of Business Administration at Harvard University since 1965, testified as an expert for Exxon. He stated that he had reviewed the Act and in his opinion the application of paragraphs B & C would result in the reduction of competition in the market, an increase in price of gasoline, and reduction of services to the consumer, and a decrease in retail

offer, or the variety and mix of goods and services provided by a retailer to attract the consumer.

Attendant problems would be caused in that certain firms would be excluded. This would reduce competitive vigor, restrict new entries into the field and curtail innovation and experimentation. The result would be a price rise. Two hundred nine company-operated stations and one hundred forty-seven independent marketer stations would be affected. These perform an important function, creating price pressures and focus upon the price-conscious customer. Most of the independents cannot operate with dealers.

Innovation and experimentation have been illustrated in the retail field in the discount stores of the 1950's, and the supermarkets which created a demand which grew nationwide. The petroleum industry is subject to the same market demands and pressures where many enterpreneurs are anxious to take advantage of customers' change in taste.

Paragraphs B and C would constitute an attack on a consumer revolution, denying to producer-refiners an opportunity to experiment with economies to be effected. Artifical barriers to entry into the market are imposed and positive incentives to leave the state result. Thirty-two integrated companies are not in Maryland, and all would be precluded. Generally, when a marketer desires to enter a new territory, service stations must be company-operated until acceptance permits dealers to take over. Backward integration would be prohibited — one who is purely a marketer, not a producer or refiner, would have no incentive to expand into refining or producing, Rockefeller, Hess, Scott, and Blaustein are examples of this in the past. Mary Hudson is a present example. The result would decrease competition in those fields as well.

Innovation such as institutional car-care centers, self-service stations, would not be possible here. In his opinion B and C would constitute positive disincentives to invest in Maryland in the petroleum field because of

uncertainty of the provision and of the duration of the law and a shift in the normal flow of petroleum products to the state would occur.

On cross-examination he stated that he had been engaged in publishing articles for and about the oil industry and had written for the *National Petroleum News*. He had worked for Standard Oil of Indiana, Mobile, Exxon, Sinclair, Meadville and was presently being paid $1600 per day by Exxon.

He stated it was not unusual for there to be a wide range of prices among stations in close proximity and decision-making as to price decreases when company stations replace dealers. He defined predatory pricing as the illegal intent to destroy competition. The most efficient means of combatting it is to respond by offering price reductions to dealers in the affected areas. Should the law be upheld, the natural evolution in the sale of petroleum products will be slowed. There is no visible benefit to society to be served by this law nor any real or substantial relation to the public welfare. Twenty-four and eight-tenths of the Maryland market is with the price marketers. In the last ten years their market share has increased 78%. Continental and PMC would be affected by the provision of paragraph C.

Dr. Charles H. Berry, professor of Economics and Public Affairs of Princeton University, was produced as Gulf's expert witness. He stated that he had reviewed paragraphs B and C and concluded they had an adverse affect upon the interests of consumers. They would lessen competition in sales and possibly in refining and would alleviate downward pressures on pricing. Under the law, integration backward from seller to refiner to producer would be prohibited. Possible refining competition could be lost and the result could be the increase of petroleum price in the state.

One should be concerned when a class of competitor is eliminated, especially in the petroleum market. It is important to present the consumer with an array of

choice. Exclusion results in the loss of a type of supplier. He cited as an example the introduction of the Volkswagen. American manufacturers for years argued buyers wanted only large automobiles. When the Volkswagen was introduced, the other manufacturers lost sales, and a dramatic trend took place. The same economic factors exist in the petroleum field, and it is important that one should not be prohibited from experimenting. The consumer is the gainer from vigorous competition even though the manufacturer or competitor may get hurt. The super market had an enormous effect upon the corner grocery, but both survive and the consumer benefited. This process must be preserved.

He conceded that his theory is general and not specifically directed to the Maryland market, although he knew of no reason why his theory would not apply here. Vertical integration could be anti-competitive in two special situations, where there is a large monopolist selling to a sole buyer. A competitor coming in would have to enter both levels, or not at all, at great expense. The other is where exclusive franchises are given, such as Bell Telephone. It being regulated, if integrated backwards would be harder to supervise.

Theodore E. Ferguson, executive vice-president of P.M.C. testified that his company is an independent cut-rate marketer operating high volume outlets — 140 stations in seven states with twenty-one in Maryland. These outlets are without exception company-operated. Experimentation has shown that the company must control price to remain competitive. A dealer would not be able to sustain a break-even or loss for a sustained period. Its price differential is approximately two cents below the majors. P.M.C. has unsuccessfully tried car-care centers. Its stations aim for 24-hour operation, or at least an hour earlier and later than major-brand stations. It maintains strict standards of cleanliness and appearance in its stations. No mechanical work, washes, tires, or accessories are provided. Under present regulations it would be impossible to put a

dealer in its stations and require him to live up to its standards and hours, or to offer him a price he could live with.

During the OPEC embargo they went along with the President's proposals and closed only when it appeared immoral to stay open. During that period dealers found excuses to close earlier as soon as they sold their gallonage and to lay off employees. He has studied the effects of paragraphs B and C and if enforced PMC would be compelled to close its Scott stations immediately and take a loss. For example, one gas pump costs $1,200.00 and some stations have eight to twelve.

He further testified that Commonwealth operates at a loss at present. But for crude costs it would be a profitable operation. Their sales prices are established by an area survey to determine what would be a competitive price. He has had no reason to take the matter of closing before his directors, but they would have to decide whether or not to close its Baltimore terminal.

Dr. T. Marcus, Professor of Economics of Rutgers University, presented by Shell, stated that at the request of the Attorney General of New Jersey he testified before the New Jersey legislature, which was considering a similar statute to Chapter 854. He was paid $6.00 for his deposition. His inquiry was to see if the public would be better off five to eight years from now in the event of enforcement.

He also stressed the undesirable features of the lessening of competition. At present, competition in the gasoline marketing retailing is intense. Substitute brands are fairly close, and price information to the consumer is readily available by driving and watching signs. The consumer must and is able to act quickly. High competition affords lower prices, better variety, and innovation.

The effect of paragraph C would be to increase prices with the elimination of producer-refiners and the price marketers affected. Forward integration is precluded.

The potential entry into competition is reduced, which in turn will affect variety and innovation which is the product of research and development. With the elimination of major marketers the incentive to gamble in research necessarily is curtailed when the opportunity to recover expenses is removed.

Dealer-operations have a distinct neighborhood advantage where clientele is local. In Shell's case, company-operated stations are under 5% of the total. Since Commonwealth is operating at a loss, it may try doing something innovative to turn a profit. It should have the opportunity to do so. The act seeks to restructure a whole industry. It would have a very far-reaching effect which may result in freezing out an enormous industry factor which could be irretrievable were the law eventually to be repealed. Gulf, for example, has already curtailed expansion plans here. The bill offers no public benefit. Its effect is entirely undesirable.

He stated he was being compensated at the rate of $450 an eight-hour day in this case. It occupied twenty-five to thirty days. During his preparation he wrote no report, but in Houston, Texas at Shell's experimental center he observed self-repair stations, space in stations being rented for repairs, facilities for changing one's own oil, and stations where groceries, film and other items were offered for sale. Some of these innovations might not be attractive to dealers, nor would dealers be apt to experiment so widely. He did not interpret the New Jersey bill to require divestiture.

He pointed out that in the 1930's Shell was operating nearly all its own stations. He stressed the importance of many decision makers.

Mr. Marcus questioned the necessity of such drastic action as to Maryland in the petroleum industry, only emphasizing that no other segment of industry was singled out. It was not attempted in the grocery industry with the advent of super markets. Divestiture

is generally relegated to firms found to have violated anti-trust laws.

Charles J. Lluellen, group vice-president of Ashland, testified that his company, although an independent refiner, which controls less than 30% of the crude it refines, is in retailing in Maryland as an independent private-brand marketer, operating at present at a price disadvantage. Prior to the OPEC embargo, its operations were profitable. At the end of 1972 its crude supply was drastically reduced so that its refinery runs reduced with attendant effect on branded and unbranded marketing.

Its retailing practices are similar to Kayo and Scott. Sixty-percent of its gasoline is sold to wholesale non-contract customers and to assure efficiency it must maintain a nucleus of controlled outlets, seventeen being in Maryland. Since it must pay more for its crude than the major producer-refiners, its costs ratio is greater.

As the result of Chapter 854 Ashland has had to consider attempting to dispose of its stations in Maryland and sell its gas in some other place. It has tried, but failed in the dealer operation area. Among its wholesale customers in Maryland are Sears Roebuck and Penny's. The law could jeopardize their position. It exchanges gasoline with Continental and sells Continental's product. The exchange is now in balance, but would be out of balance were the law to be enforced. If forced to withdraw, it would be placed at a great disadvantage not only with its refinery runs, but would face losses in disposing of its holdings.

Under cross-examination he stated that *Fortune* Magazine place Ashland's profit increase within the first one hundred companies for 1973-1974. Its crude supplies are 50,000 barrels world-wide and 30,000 locally. The act would not affect its crude supply, but can affect refinery runs. It would be impossible to operate as before if the law were to survive. Nor could

he conceive of any one purchaser taking the entire output.

In 1953 to 1970 Ashland tried to enter the Michigan market, but was unsuccessful. It invested over $1,000,000 and had thirty-five stations. When it failed to capture more than 0.25% of the market it took its losses and left.

There were no written contracts with its customers when the shortage came. All were told that they would be placed on an allocation program, and told if they left them might not thereafter be supplied. They supplied their own stations, but less than before. They closed the least-efficient operations. All who stopped purchasing from them did so voluntarily.

One alternative if the law is upheld is to withdraw the gasoline from Maryland and run it through other states. It can now sell at retail as much as it can get.

Mary Hudson Vandergrift testified that her business name is Hudson Oil Co. This operates in 36 states as purely a marketing company with 315 outlets. It has no production or refinery. Her stations are company-owned and operated and the product is sold at two to three cents below the majors' price. She competes with Payless, BiLo, and Red Head brands. Ashland supplies her operations. Price control is paramount, and company control is required for the same reasons related by the other independents. She tried dealers for six months during World War II and lost control. Dealers would not follow order, and stations were allowed to become dirty.

Since thirty-five percent of her stations were closed during the crisis, she has determined to acquire a refinery. This should assure a supply over which she has control. This is known as backward integration. It is expensive, but will enable her to improve services and increase the number of customers.

With Chapter 854 in effect, she will have to dispose of Maryland stations although she has been here for twenty years. She doesn't need a law to protect her from Ashland. She can meet the competition.

She has no arrangements for crude from Ashland. It will come from off-shore and domestic wells. Her experiment during the war with dealers involved thirty stations out of one hundred twenty. She hasn't tried it since.

John H. Lichtblau, a witness produced on behalf of Ashland, is an economic researcher and executive director of Petroleum Industry Research Foundation. He has testified before the U.S. Senate on a number of occasions. He was familiar with the Emergency Petroleum Allocation Act and Chapter 854.

Ashland is considered an independent refiner which is a refiner whose supplies are low. It cannot compete with the major companies nor advertise on a national scale. It is a price-marketer and its gasoline cost depends directly on the price of crude oil. The means of competition is through discounting which necessitates high volume sales and low overhead. This is as true for refineries as for retail outlets. Therefore, for efficiency a continuous flow of refined products is essential. Since the wholesale market is extremely volatile, the independent refinery requires retail outlets to keep its output constant. A reduction in the number of stations in the state would mean the remaining ones would sell at a higher price, if the private-brand marketers were removed from competition. There is no chance of Ashland getting into the dealer market without all the expense attendant to becoming a recognized brand, and as such would be impractical.

The preamble to the Federal Petroleum Act recites that the Congress' design was to protect the independent marketers and refiners.

On cross-examination he conceded that in the event of the withdrawal of Ashland and others from the Maryland market there was nothing to prevent operators such as Mrs. Hudson from taking over some outlets and continuing to sell at discount. However, since some 180 sites would be affected, it was unlikely that all could or would be utilized, and that a net loss of retail

outlets would take place, although Sears and Penny's could be supplied by others.

In his opinion the situation which caused the shortage was totally beyond the control of Maryland, and had nothing to do with any condition within the state.

On the part of the defendants, Mr. John Coleman, Chief of the Gas Tax Division of the Comptroller's office, testified that his department is the only department charged with gas tax problems, but he was unable to identify the number of sales in the state at any given time. Only one state, Georgia, has this ability. In June of 1973 the Comptroller received a letter from the Governor making inquiry concerning gasoline station operations during the period of "real or contrived" shortage.

In response, his department sent questionnaires to 4,055 service station dealers requesting various information for the calendar years 1971, 1972 and to June 13, 1973. Thirty-four percent replied. Generally, the survey indicated that of the major oil Company-owned leased-to dealer stations allocations for the period ranged from 70% to 106% of prior purchase. Of 772 responses 171 outlets were unrestricted. One hundred fifty-eight limited sales to customers and 93,300 hours were lost. Wholesale increases ranged from 0.9 to 5.5 cents per gallon and pump prices increased 0.8 to 6.6 cents. Temporary discounts of 0.5 to 7 cents were withdrawn. Before the crisis, dealers were encouraged to maintain longer hours, including Sunday openings. Volume was stimulated through gifts and promotions. Self-service had been introduced.

In the case of privately owned major-brand stations, allocations ranged from 0% to 150%. Of 503 dealers reporting 378 were forced to close or limit sales. Voluntary allowances from 1 to 1½ cents were withdrawn and wholesale prices rose 5 to 8 cents while retail prices rose 0.5 to 10 cents.

The Tax Division assumed that leases were cancelled to channel volume through controlled outlets for greater profit. B.P. drew the greatest number of complaints, but the reason, as previous, was an assumption.

Of unbranded outlets numbering eighty, thirteen were unrestricted and sixty-seven allocated 49% to 90% of the allotment the previous year. Here, 24,000 hours were lost with 70 limiting sales. Thirty-nine were forced to close. Wholesale prices rose from 0.5 to 9.75 per gallon and pump prices 0.5 to 10 cents. Price rises rendered this category of stations unable to compete with branded or better facilities in the area. Foreign supplies were not protected by Federal guide lines.

Of fifty-two company operated outlets reporting, only one reported allocation. Pump prices increased from one to six cents. Crown Central Petroleum and Alert failed to respond, but it was the conclusion of the office that company operated outlets were unaffected while independent and unbranded stores were most affected.

Major-branded dealers seized upon the opportunity to reduce hours while selling the same volume of fuel as in the past. The conclusion was that there was a trend to restrict and eliminate lower volume outlets as well as those who were owners or who leased back. The low response was taken to mean satisfaction with present arrangements or fear of reprisal by majors.

His office then conducted a spot audit of Exxon for three months in 1973 and 1974. Using fifteen company stations and fifteen leased stations it was determined that Exxon had, in fact, fairly allocated between the two groups. Save in one instance in allocating to farmers, Getty had properly allocated also. When the mistake was brought to the latter's attention, it was immediately rectified.

On the strength of the above, the Comptroller requested Coleman draft a bill. The draft was sent to the Governor, who in turn sent it to the Legislature. Bills were introduced simultaneously in the House and Senate, known as H.B. 98 and SB 465, respectively. Mr.

Goldstein testified before the legislative committees and copies of the analysis of the reports were presented.

Coleman proceeded then to give his definition of the terms used in the bill as enacted. He stated that the tax division has promulgated an orderly manner of divestiture. No other rules or guidelines have been formulated pending the outcome of this litigation. Should it be upheld, the majors would be requested to participate in hearings on formulating regulations.

Under cross-examination he stated that in drafting the bill he consulted no economist and made no investigation on the economic impact of the proposed law, even though based on the evidence he had, no majors were misallocating for the audited period. So far as he was concerned there was no relationship between the survey and paragraphs B and C of Chapter 465. When questioned concerning the application of the act to the various entities which it would affect, he stated in his opinion the act could not be amended to take in every facet of the gasoline industry. He defined a producer-refiner as any person producing, refining, compounding, blending motor fuel in this state, as defined in § 157A (7) of Article 56. The definition of 157A would apply to 157E. The latter phrase is further defined in § 135(h). Any one blending is a compounder. To him a manufacturer is a producer. Anyone blending would be considered a manufacturer as in the case of Continental exchanging with Ashland. No plaintiff in the case produces in Maryland.

Wholesalers had been included in the draft. There was no reason he knew of to exclude them. He was of the opinion that Ashland had a crude shortage and was unable to furnish the usual supply to its customers.

On questioning by the Court, the witness stated he personally felt it was unnecessary to draft the act. He presented the report to Goldstein and the latter said to draft it. He does draft bills which he feels are necessary and they are checked by the Attorney General's Office.

Arthur E. Price, Chief of Motor Fuel Inspection for the State was a former Citgo Regional Marketing Manager. He testified that there was no follow-up to the original questionnaire because there wasn't time. The target date was the end of August. He obtained other information, but did not feel it was his division's obligation to reach a conclusion as to whether shortage was real or contrived. In the survey of the service stations or major oil company survey nothing leads him to the conclusion that there is anything present which is detrimental to the public welfare.

Dr. James M. Patterson, produced as a defense witness, is a Professor of Marketing of Indiana State University and teaches marketing strategy. He has authored two books, *Competition Limited,* in 1962 and *Highway Robbery,* in 1974. He has co-authored texts on marketing. He also has testified before the U.S. Senate. He has studied literature on the petroleum marketing practices in Maryland. In his opinion, competition is enhanced by variety, innovation, new products, price, and convenience. He is familiar with paragraphs B and C of the act. He thinks those paragraphs will preserve and enhance "air tight" competition and increase benefits to the public. In the industry, he finds as between majors there is non-price competition. Sale force is between types of marketers. The private brands find the principal weapon is price. Between majors price is self-defeating. If the law is effected, probably some marketers would leave the state, but stations would be sold and non-integrated marketers would probably take over. Innovative techniques would to some extent be handicapped, but much important innovation seems to come from outside. Self-service was used by non-integrated marketers.

Retail prices in the state will be determined by the cost of crude affected by the OPEC nations and not by Maryland and the U.S. Certain actors will not be able to enter the market, but the problem is not serious. Divestiture, although another method might have been

utilized, is not an unrealistic approach to the problem. There are advantages to the public to permit company-owned and operated stations as related by plaintiffs' witnesses. However, the huge windfall profits of the majors and refiner marketers from the rise in crude prices would be focused upon the price marketers. Without the law the interprice competition will be lessened. He thought the government should maintain its supervision.

On cross-examination he stated he had done more research since his deposition in August. He now has a better idea of the competitors and the geography of the state. He can't now identify the price-setters and the price-takers in this artificial market in Maryland. *Competition Limited* was the result of articles he had read and conversations conducted with members of SIGMA — Society of Independent Gas Marketers. He surveyed the St. Louis market. SIGMA members mostly own large chains of salary-operated private brand operators. It helped subsidize the book. *Highway Robbery* is partially a condensation of the first. It was subsidized by the Council of Independent Gasoline Marketers. He received $6000 for it. CIGM members have been members of SIGMA — he said they were a more radical group than SIGMA. They advocated that buy-outs of independents be stopped.

If there were no discounters to bring the price down in Maryland, there would be a problem in competition here.

The competitive behavior of the seller is the effective test, and not the ownership of the outlet. Company-owned stations are better able to deal with price-cutters. It is not good economics for the government to shield one competitor from another. Shielding is acceptable only if competition is preserved, but predatory competition is now illegal. If company operations are used to check discounters, it would be anti-competitive, otherwise, it would be pro-competition.

Before the FEA went into effect, dealer margin was seven cents. Under FEA dealer margins were permitted to rise to eleven cents. He thought FEA was coerced by an unarmed rebellion of retail dealers. The rise came as the dealers threatened to close their stations. This came in the face of reduced dealer cost. As such, it was not a competitive market. It would be pro-competitive for companies to come in and operate stations at the old margin. The public would certainly benefit in this event. He thinks the dealers support the present law because they see a decline in the opportunities for dealers in the competitive market. They see margin competition. One of the effects of the law would be to protect the branded dealers' margin and this also is not in the public interest. Government should not shield any group from non-predatory competition. The proper role of government is not being performed in preserving the vigor of competitive process when it prohibits fair competition between company operations with salaried employees and any other segment of the industry. As to this instance, the proper role of government is not being performed under paragraphs B and C for the act. He has never made a cost benefit analysis of the statute's effect on Maryland motorists. He knows of no price-marketer who will come into Maryland as the result of this law. The withdrawal from unprofitable operations and accelerated closing of low-volume stations are good things. There is a surplus of gasoline at present.

He was troubled over Chapter 854 with respect to refiner-marketers like Ashland. It did not make economic sense. Ashland, as a crude-deficient refiner, markets substantially to independent marketers and price-makers. It is extremely pro-competitive. They are essential as suppliers. He supported federal legislation to get crude to the independent refiner-marketers. They were victims of the embargo and disadvantaged with respect to the majors. The crude-deficient refiners are safety valves. He agreed that Ashland in Maryland could not maintain dealer stations, and would have to withdraw.

His concern would be with aggressive rather than passive price setting. Ashland tends to meet price. It should not be removed from the state market. The legislation would be of negative benefit if its effect would eliminate the price-followers. He would have revised the definitions had he drafted the law.

With regard to Hudson, she is sensible to integrate. A new refinery would be pro-competitive and an improvement. She would be a crude-deficient refiner-marketer. A law that would require her to cease to sell in Maryland is not consistent with sound economic principles. If she were to divest it would mean a net loss to her and the public unless someone else took over her stations. The law has negative aspects with respect to Commonwealth, Coastal States and Hudson also, but if they were to become too large then the effect would be otherwise.

THE LAW

The years 1972 and 1973 were truly "times to try men's souls." The petroleum shortage touched the life of every citizen, and especially the motoring public and those whose livelihoods were derived from allied industry. Rumors abounded as to cause and effect, and there were even those in the highest echelons of national government who darkly warned of war, if necessary, to obtain the supplies of crude oil to preserve the American way of life. It is little wonder, therefore, that the Executive Department of this State would make inquiry as to whether or not the shortage was real or contrived, and that the Legislature undertook to protect its electorate from what it perceived to be the source of the contrived evil existing within its boundaries. The result was Chapter 854 of the Acts of 1974 and the subsequent amendment, Chapter 608 of 1975.

Because of the drastic economic impact of this law as amended upon the companies affected, the plaintiffs, as well might be expected, have appeared and attempted to assert every possible constitutional impediment to the

implementation of the law. It is the unenviable task of the undersigned to undertake the first step toward the determination of whether or not the Plaintiffs' position is legally sound.

The Plaintiffs' collective position is that (a) it conflicts with the Robinson-Patman Act, 15 U.S.C. 13; (b) it is preempted by the Federal Emergency Petroleum Allocation Act of 1973 and the Federal Energy Administration Act of 1974; (c) the plaintiffs are not subject to the provisions of the act; (d) it burdens interstate commerce; (e) it is unconstitutionally vague; (f) the act constitutes an unlawful exercise of the police power of the State and denies the plaintiffs due process of law; (g) the act is discriminatory and constitutes a denial of equal protection of law; (h) the act provides an unconstitutional taking; and (i) it constitutes an unlawful delegation of authority.

These contentions will be dealt with seriatim.

CONFLICTS WITH THE ROBINSON-PATMAN ACT

The court has already dealt with this contention, and has granted plaintiffs' motion for partial summary judgment with respect to paragraph D of the act for the reasons previously expressed in open court as supplemented by the subsequent order. It will not be discussed further.

PREEMPTION BY THE FEDERAL EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, 15 USC § 751, ET SEQ. AND THE FEDERAL ENERGY ADMINISTRATION ACT OF 1974, 15 USC § 761.

The above acts, so long as they remain viable by their own terms, preempt all other laws. Section 755 (b) of Article 15 USCA states:

> "The regulation under section 753 (mandatory allocation) of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual

fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

That such an expression of legislative intent is binding upon the State was established as early as *McCulloch v. Maryland,* (1819), 17 U.S. 416, while *Gibbons v. Ogden,* 9 Wheat 1, requires that regulation of phases of national commerce demand that regulation, if any be prescribed by a single authority. Therefore, the motion for partial summary judgment as to paragraph F must be granted.

THE PLAINTIFFS ARE NOT SUBJECT TO THE PROVISIONS OF THE ACT

This contention is developed through an ingenious theory, to wit: the term "producers or refiners" as used in the act is synonymous with the term "manufacturer and refiner" according to John Coleman's definition. The term "manufacturer and refiner" is expressly defined in the motor fuel inspection law, Annotated Code of Maryland, Art. 56, § 157A(7), et seq., as:

> ". . . any person, firm or corporation engaged in producing, blending or compounding motor vehicle fuels in this State."

Plaintiffs do not produce, blend (except in the case of Shell and Gulf which they maintain is *de minimus*), or compound motor vehicle fuels within the territorial boundaries of the State of Maryland, and thus are not affected by the Act. In order to accept this argument, this court would be compelled to find that the Legislature enacted laws which it intended to be of no effect and all its labor with regard to the law was an exercise in futility. Such a finding would be contrary to reason and common sense, and would produce bizarre and preposterous results. However, there is no need for the court to reach this issue or the considerations demanded by *Slate v. Zitomer,* 275 Md. 534 (1975) regarding it, as the court believes the ultimate disposition of the case is determined by the police power issue.

The motion for partial summary judgment based upon this reason is therefore denied.

THE BURDENS TO INTERSTATE COMMERCE

This member of the court remains unconvinced that the act, if otherwise valid, would unduly burden interstate commerce. In the recent case of *Merrill Lynch, Pierce, Fenner and Smith v. Ware,* (1973), 414 U.S. 117, 38 L. Ed. 2d 348, the appellant sought to claim that California's statutory policy of protecting its wage earners unduly burdened interstate commerce where appellant was admittedly engaged in interstate commerce, and Ware's employment by appellant was conditioned upon his approval by the New York Stock Exchange and subject to its regulations. A unanimous court held that the national government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation.

In this case the flow of petroleum products into the State is not sought to be regulated or curtailed. The statute seeks merely to impose more stringent control over its sale after it enters its boundaries. The law would merely assert a new ramification with regard to an industry which the State has already regulated, and the industry, up to now, has taken scant, if any, measures to assert this objection.

VAGUENESS

This court agrees that the statute is vague. It gives a lick-and-promise appearance of a measure having been passed with a minimum of study in order to placate a vocal advocacy. For example, paragraph F apparently applies only during periods of shortage. "Periods of shortage" is an undefined phrase, and there is no hint as to its meaning. Shortage means deficit, but it is unclear whether a local shortage or a state-wide shortage would trigger the provisions of the paragraph, nor is it clear under what circumstances the period

would be declared, or by whom. To the same effect are the undefined expressions, "voluntary allowances," and "uniformly."

The language contained in *Connally v. General Construction Company,* 269 U.S. 385, 391, seems particularly applicable:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law."

The statute appears deficient in this regard, since it would seem "that men of common intelligence must necessarily guess at its meaning and differ as to its application," a violation of the first essential of due process. *Giant of Maryland v. States Attorney,* 67 Md. 501, 515. *Lashley v. State,* 10 Md. App. 136. See also *Loughran Co. v. Tobacco Co.,* 178 Md. 38 where an act was held unconstitutional which attempted to use "existing market conditions" to justify a price of a commodity.

However, such technical assertions, even if upheld, could and very well might result in reenactment of the law, with a few housekeeping changes aimed at meeting the lack of definitions and the clearing up of ambiguities. However, in the opinion of this member of the court the major infirmity of the legislation would still remain, based upon an unlawful exercise of the police power of the state. It is discriminatory, denies equal protection of the law and constitutes an unconstitutional taking.

DELEGATION OF LEGISLATIVE POWER

The rule pronounced in *Pressman v. Barnes,* 209 Md. 544, 555 as recently reviewed in *Montgomery County v. Walsh,* 274 Md. 502 is as follows:

> "Generally, a statute or ordinance vesting discretion in administrative officials without fixing any standards for their guidance is an unconstitutional delegation of legislative power.
>
> But we also hold, as a qualification of the general rule, that where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without such restrictions may be valid. (citations omitted) It is recognized that it would not always be possible for Legislature or City Council to deal directly with the multitude of details in the complex situations upon which it operates. *Comptroller of Treasury v. M. E. Rockhill, Inc.,* 205 Md. 226, 232, 107 A.2d 93. The modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases."

Mr. Coleman testified it would be impossible to tailor guidelines to fit every conceivable aspect of so intricate an industry. The validity *vel non* of the delegation of powers would therefore seem to depend upon whether or not the measure were properly within the exercise of the State's police powers.

POLICE POWERS

While recognizing the universal concept that all acts of the Legislature must be presumed to be valid, and one attacking the constitutionality of a statute has the burden of affirmatively and clearly establishing its invalidity, *Salisbury Beauty Schools v. State Board,* 268 Md. 32; *Wilson v. Board of Supervisors of Elections,* 273 Md. 296, the court is also required to place a strict construction upon the statute, since it is in derogation of the common law right of an individual to dispose of his property or his services at such a price upon which he and a purchaser may agree. *Loughran Co., supra.*

There can be no question that the sale of gasoline and other petroleum products is a valuable and lawful right. Were it not so, neither the law nor this litigation would ever have been instituted.

> "Freedom of contract is not absolute. It is subject to reasonable legislative regulation in the interest of public health, safety and morals, and in a sense not resting merely on expediency, the public welfare. But restraint upon such freedom must not be arbitrary or unreasonable. Freedom is the general rule and restraint the exception." *Constitutional Limitations,* Cooley, Vol. 2 (8th Ed.) 1236.
>
> "The guaranty of due process simply demands that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained. Within the above limitations, a state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by laws aimed at monopolies, or by curbing harmful competition by fixing minimum prices." *Nebbia v. People of New York,* 291 U.S. 502, 78 L. Ed.

In a recent line of cases the Court of Appeals has established a standard for review of economic legislation which is more restrictive than the test applied in recent years by the Supreme Court of the United States.

As stated by the court in *Aero Motors v. Adm'r. M.V.A.,* 274 Md. 567, 587 (1975):

> "Although Art. 23 of the Maryland Declaration of Rights has long 'been equated' with the 'due process' clause of the Fourteenth Amendment by judicial construction and application, the two provisions are not synonymous. The decisions of the Supreme Court appear to uphold the validity of a regulation as within the exercise of the 'police power,' and hence not a denial of 'due process' if the statutory enactment is based on any reasonable consideration affecting the public welfare. See *Nebbia v. New York, supra; Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955)."

See also *Bowie Inn v. City of Bowie,* 274 Md. 230 (1975) at page 253 (Dissenting Opinion, J. O'Donnell).

In *Salisbury Beauty Schools, supra; Maryland St. Bd. of Examiners v. Kuhn,* 270 Md. 496 (1973); *Maryland Bd. of Pharmacy v. Sav-A-Lot,* 270 Md. 103 (1973); and *Aero Motors v. Adm'r. M.V.A., supra,* Maryland has followed the "traditional" test formulated in *Lawton v. Steele,* 152 U.S. 133, 137 (1894) and followed in *Goldblatt v. Hempstead,* 369 U.S. 590, 594-95 (1962), requiring that a "real and substantial relationship" to the object sought to be attained by the statutory regulation be shown. The federal-state dichotomy was clearly pointed out in *Sav-A-Lot, supra.*

The test enunciated in *Lawton v. Steele, supra,* is that:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In restating the standard of reasonableness in *Goldblatt v. Hempstead, supra,* the Supreme Court went on to state:

> "The ordinance in question was passed as a safety measure and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which

> appellants will suffer from the imposition of the ordinance." 369 U.S. at 595.

The defendants maintain that this is no longer the test in Maryland. They contend that the plaintiffs are not entitled to a declaration of invalidity on due process grounds unless they can meet the heavy burden at trial of demonstrating that there is absolutely no rational relationship between the objects of the act and the means employed by the Legislature to attain those objects.

Our Court of Appeals has only once departed from the *Lawton v. Steele* test in their recent opinions, that being in *Bowie Inn v. City of Bowie,* 274 Md. 230 (1975) in which the majority did so, as noted by Judge O'Donnell in his dissenting opinion, by ". . . conspicuously omitting from the criterion the requirement that the means selected must have a real and substantial relation to the object sought to be attained," and thus ". . . departed from the 'traditional test' which our cases have adopted."

Defendants place great reliance upon *Bowie, supra.* They assert that *Bowie,* taken in conjunction with the decisions in *Ferguson v. Skrupa,* 372 U.S. 726, 83 S. Ct. 1028 (1963), *North Dakota St. Bd. of Pharm. v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 94 S. Ct. 407 (1973), and *Wall v. American Optometric Association, Inc.,* 379 F. Supp. 175 (N.D. Ga., 1974), *affirmed* 419 U.S. 888, 95 S. Ct. 166 (1974), serves to dispel the requirements of the *Lawton v. Steele* test and place in its stead the "rational basis" test.

Prior to *Bowie* in *Sav-A-Lot,* the Court of Appeals noted:

> ". . . That whatever may be the current direction taken by the Supreme Court in the area of economic regulation, as distinguished from the protection of fundamental rights, Maryland . . . adhere(s) to the more traditional test formulated by the Supreme Court and enunciated in *Lawton v. Steele* . . ."

If, indeed, any erosion was visited upon this well-established doctrine by *Bowie,* the hiatus which it created was of short duration, for within two months of the date on which *Bowie* was decided, the Court delivered its opinion in *Aero Motors v. Adm'r. M.V.A., supra,* which clearly indicates that the "traditional" test formulated in *Lawton v. Steele* is still the law in Maryland.

The Court of Appeals has invalidated, on constitutional grounds, a state law prohibiting anyone from selling anything which uses a gift as an inducement of sale, *Long v. State,* 74 Md. 565 (1891); a statute prohibiting railroad and mining corporations from selling goods to company employees; *Luman v. Hitchens Bros. Co.,* 90 Md. 14 (1899); a law regulating the valuation of trading stamps; *State v. Caspare,* 115 Md. 7; a law requiring all coal mining corporations to pay their employees on a semi-monthly basis; *State v. Potomac Valley Coal Co.,* 116 Md. 380 (1911); a law providing for the licensing and regulation of paper-hangers in Baltimore City; *Dasch v. Jackson,* 170 Md. 251 (1936); a statute requiring ten years of educational preparation in order to obtain a barbering license; *Schneider v. Duer,* 170 Md. 326 (1936); a state law prohibiting the advertising of prescription drugs; *Md. Board of Pharmacy v. Sav-a-Lot, supra;* and a state law restricting cosmetologists from cutting or shampooing male hair; *Md. State Board of Barber Ex. v. Kuhn, supra.*

The Attorney General in his opening statement maintained that there was an evil at hand identified by the Legislature. Presumably, he referred to a contrived shortage of petroleum and heating oils, since this was the topic of the Governor's inquiry. He stated that his witnesses would show that divestiture would restore and maintain free competition; that the law was aimed at preserving competition and not to protect any identifiable group; that company-owned and operated stations produced detrimental effects upon the retail marketing of petroleum products.

The evidence did not support these statements. The court finds from all the evidence produced before it that the shortage was actual and beyond the control of the legislature of the State or of the Congress of the United States and was directly related to the OPEC embargo. Defendants' witness, Dr. Patterson, admitted that even he was of the opinion that the scope of the law was overly broad. Apart from restraining free competition, it was shown that divestiture would be harmful to competition in the industry, and would primarily serve to protect the independent dealers rather than the public at large. There was no proven detrimental effect upon the retail market caused by company-owned-and operated stations which could not be curbed by federal and state anti-trust laws.

In applying the evidence in this case to the first test of *Lawton* — that the interest of the public generally must be served as distinguished from those of a particular class, or stated otherwise, that a real and substantial relationship to the object sought to be attained must be shown — the court specifically finds that among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be eliminated, the effect of which would be anti-consumer, and that any law which had such an effect would not be in the interest of the public at large.

> "It follows from these facts that it would be in the best interests of the public — to enable purchasing at the lowest available prices."
>
> *Sav-a-Lot, supra,* at p. 121.

The court also finds from the preponderance of the evidence that the law will preclude all of some thirty-two producer-refiners not now in the State from ever entering the competitive market in Maryland, and vertical integration will be prohibited. Neither effect is

in the public interest since competition is essentially for consumer benefit.

Noteworthy also is the fact that the original draft of the law included wholesalers in the prohibition against retail selling. The final draft of the law eliminated wholesalers, for the sole reason, according to Mr. Coleman, that the wholesalers requested their elimination from the act. There was no evidence whatsoever relative to why wholesalers should have been included initially, nor how the general public benefited from their exemption.

In all the more than one hundred eighty-five pounds of pleadings, motions, briefs, exhibits and depositions before this court, there is no concrete evidence that the act was justified as to the classes of operators singled out to be affected in order to promote the general welfare of the citizens of the State. Rather, it is apparent that the entire bill is designed to benefit one class of merchants to the detriment of another. *Regal Oil Co. v. State,* 10 A.2d 495 (N.J. 1939).

Evidence showed that of the refiners-producers complained of, B.P. was mentioned by most as the greatest offender. In justification for its actions there was shown that B.P. has lost more than $150,000,000 in its recent operations in this area. There is no known legal obligation which would require a corporation or an individual in our capitalistic society to continue to lose money in order to preserve the business of those who directly depend upon it.

Both defense witnesses from the Gasoline Tax Division conceded that from their statistics there was no reason they could determine which would justify the act. After the FEA allotment requirements went into effect, their audit of twenty-six Exxon stations disclosed only fair allocation among the dealer- and company-operated outlets.

The court finds that as in *Sav-a-Lot, supra,* apart from there not being demonstrated a real and substantial relation to the object sought to be attained by the

means selected, the evidence presented before it indicates that the statute is inversely related to the public welfare.

Turning to Lawton's other tests — that the means employed must be reasonable, not unduly oppressive or beyond the necessities of the case — it will be observed that the means of carrying the law into effect as to the producer-refiners would have necessitated that on or before July 5, 1975 some 229 outlets amounting in value to over $12,800,000.00 would have to have been divested, unless the Comptroller were to be convinced of the merits of extending the divestiture period. There was no suggested way in which those affected could obtain a fair market price in arms-length transactions when the potential purchasers were well aware of the exigencies of the occasion. The result would amount to forced sales or leases on a buyers' market, with scant chance of obtaining a fair return on investments made in Maryland in good faith by the entities affected.

This court has been referred to no situation short of the Prohibition Era where any group of retailers engaged in lawful mercantile activity have been compelled to divest without at least an appreciable period designed to afford amortization of the assets affected by the order. It finds the means unduly oppressive and beyond the necessities of the case.

As previously mentioned, the reasons for focusing upon the petroleum industry were obvious, but similar legislative attempts to restrict competition in marketing in this and other industries have generally been held to be unconstitutional. A New Jersey statute prohibiting hawking and peddling was stricken in *N.J. Good Humor v. Board,* 11 A.2d 113, 117; a Kansas statute prohibiting manufacturers, distributors, or sellers of gas from selling gas appliances was likewise ruled an unlawful exercise of police power in *Capital G & E Co. v. Boynton,* 22 P.2d 958; a Florida statute was nullified in *Exxon Corp. v. Conner,* Cases 74-1449, 74-1577, 74-1772, Circuit Court of the Second Judicial Circuit in and

for Leon County, Florida where Florida's equivalent to Chapter 854 was also nullified. That court held that a state cannot arbitrarily interfere in private businesses or impose unreasonable and unnecessary restrictions upon them under the guise of protecting the public. Discriminatory legislation damaging to one segment of a class of business and beneficial to another is not a valid exercise of police power. *Eskind v. City of Vero Beach,* 159 A.2d 209 (Fla. 1963).

Amici in their brief have devoted seven and one-half pages to the holding in *Paramount Pictures v. Langer,* 23 F.S. 890 (1938), wherein the State of North Dakota had prohibited motion picture producers from owning theatres in that state. That case was reversed by the Supreme Court in 306 U.S. 619, 83 L. Ed. 1025 on the ground of mootness. However, this Court notes that the District Court stated in its opinion:

> ". . . but there is evidence in the record here which justifies an inference of suppression of local competition in states other than North Dakota by producers having affiliated theatres; and the evidence also discloses the existence of the power and in temptation of such producers to engage in practices promotive of monopoly and restraint of trade."

Likewise, in *Crescent Oil Co. v. Mississippi,* 257 U.S. 129 (1921) there was evidence that corporations operating cotton gins would depress the price of ginning, regardless of cost, until local competition was overwhelmed, whereupon the costs were raised, while unfair prices were paid for seed. Such monopolistic practices were held to be clearly subject to the power of the legislature.

If such evidence did exist before the legislature, it was not presented to the court. Hence, the examples cited as well as laws regarding common carriers and closely regulated industries are inapposite.

DENIAL OF EQUAL PROTECTION
UNCONSTITUTIONAL TAKING
UNLAWFUL DELEGATION OF AUTHORITY

The Plaintiffs' "denial of equal protection" argument is inexorably interwoven with their "unconstitutional taking" argument and have been covered in the "police power" section.

The delegation of authority argument has been covered in the section on vagueness of this opinion.

It being the court's conviction that from the evidence presented before it that Chapters 854 of the Acts of 1974 and 608 of the Acts of 1975 are unconstitutional, the following Declaration is hereby issued:

DECLARATION AND INJUNCTION

Issues having been joined in the aforegoing Equity causes, stipulation of facts were received, evidence was taken, arguments of counsel were heard, briefs were received, and the proceedings read and duly considered.

WHEREUPON, it is this 27th day of January 1976 by the Circuit Court for Anne Arundel County, in Equity,

DECLARED for the reasons given in the aforegoing memorandum that Chapter 854 of the Acts of the Legislature of 1974 and Chapter 608 of the Acts of the Legislature of 1975 are unconstitutional and void.

The Defendants and their agents, employees, and all other persons serving under them are hereby enjoined from taking any action to enforce said statutes with respect to any of the parties plaintiff. Costs are to be assessed against the defendants.

E. MACKALL CHILDS,
Judge.

APPENDIX E

NOTICES OF APPEAL

In The
Circuit Court For Anne Arundel County

Equity Nos. 22,069 and 22,502

Exxon Corporation and Phillips Petroleum Company,
Plaintiffs,
v.
Marvin Mandel, Governor, et al.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Exxon Corporation and
Phillips Petroleum Company
(Filed June 27, 1977)

Notice is hereby given that Exxon Corporation and Phillips Petroleum Corporation, plaintiffs in the above-captioned actions, hereby appeal to the Supreme Court of the United States from the decision of the Court of Appeals of Maryland entered on February 18, 1977 reversing the decision of this Court and remanding the case for entry of a judgment in accordance with its opinion, which decision became final upon the filing of a supplementary opinion by the Maryland Court of Appeals on April 13, 1977 denying plaintiffs' motion for reconsideration. The appeal is from that part of the decision applying to Paragraphs B, C and D of Chapter

854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975.

Pursuant to Rule 877 of the Maryland Rules of Procedure, the record in these actions is in the possession of this Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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In The Court of Appeals of Maryland

September Term, 1976

No. 10

Governor of The State of Maryland, et al.,
Appellants,

v.

Exxon Corporation, et al.,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Exxon Corporation and Phillips Petroleum Company
(Filed June 27, 1977)

Notice is hereby given that Exxon Corporation and Phillips Petroleum Corporation, appellees in the above-captioned action, hereby appeal to the Supreme Court of the United States from the order of the Court of Appeals of Maryland entered on February 18, 1977 reversing the judgment of the Circuit Court for Anne Arundel County and remanding the case for entry of a judgment in accordance with its opinion. Appellees' motions for reconsideration and stay of mandate were denied by the Court of Appeals on April 13, 1977. The appeal is from that part of the decision applying to Paragraphs B, C and D of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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In The
Circuit Court For Anne Arundel County

Equity No. 22,091

Continental Oil Company, et al.,
Plaintiffs,

v.

Marvin Mandel, Governor, et al.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Continental Oil Company and
Kayo Oil Company
(Filed June 27, 1977)

Notice is hereby given that Continental Oil Company and Kayo Oil Company, plaintiffs, by their attorneys, Wilbur D. Preston, Jr., Stanley B. Rohd and Whiteford, Taylor, Preston, Trimble & Johnston, appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Anne Arundel County, Maryland, in the above-entitled case and remanding the case for entry of a judgment in accordance with the views expressed in the Opinion of the Court of Appeals filed on February 18, 1977, and as to which the plaintiffs' motion for reconsideration was denied on April 13, 1977, and the Court's Mandate issued on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) (1970).

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Company and Kayo Oil
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In The
Court of Appeals of Maryland

Docket No. 10

September Term, 1976

Governor of The State of Maryland, et al.,
Appellant,

v.

Exxon Corporation, et al.,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Continental Oil Company and
Kayo Oil Company
(Filed June 27, 1977)

Notice is hereby given that Continental Oil Company and Kayo Oil Company, appellees, by their attorneys, Wilbur D. Preston, Jr., Stanley B. Rohd and Whiteford, Taylor, Preston, Trimble & Johnston, appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Anne Arundel County, Maryland, in the above-entitled case and remanding the case for entry of a judgment in accordance with the views expressed in the Opinion of the Court of Appeals filed on February 18, 1977, and as to which the appellees' motion for reconsideration was denied on April 13, 1977, and the Court's Mandate issued on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) (1970).

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In The
Circuit Court For Anne Arundel County

Equity No. 22,216

Shell Oil Company,
Appellant,

v.

Marvin Mandel, Governor of the State of Maryland, et al.,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

by Shell Oil Company
(Filed June 23, 1977)

Notice is hereby given that Shell Oil Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland, reversing the decision of the Circuit Court for Anne Arundel County that Paragraph D of Chapter 854 of the Laws of Maryland 1974 is in conflict with the federal Robinson-Patman Act. The judgment of the Court of Appeals of Maryland was entered in this action on February 18, 1977, and the petition for reconsideration was denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: June 23, 1977

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In The
Court of Appeals of Maryland

No. 10

Shell Oil Company,
Appellant,

v.

Marvin Mandel, Governor of the State of Maryland, et al.,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Shell Oil Company
(Filed June 23, 1977)

Notice is hereby given that Shell Oil Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland, reversing the decision of the Circuit Court for Anne Arundel County that Paragraph D of Chapter 854 of the Laws of Maryland 1974 is in conflict with the federal Robinson-Patman Act. The judgment of the Court of Appeals of Maryland was entered in this action on February 18, 1977, and the petition for reconsideration was denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: June 23, 1977

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In The
Circuit Court For Anne Arundel County

Equity No. 22,461

Gulf Oil Corporation,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Gulf Oil Corporation
(Filed June 27, 1977)

Notice is given that Gulf Oil Corporation, plaintiff in Equity No. 22,461, appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland filed on February 18, 1977, upholding the constitutionality of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, and reversing the final decree of the Circuit Court for Anne Arundel County entered on January 27, 1976. Motions for reconsideration and stay of mandate were denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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In The
Court of Appeals of Maryland

September Term, 1976

No. 10

Governor of The State of Maryland, et al.,
Appellants,

v.

Exxon Corporation, et al.,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Gulf Oil Corporation
(Filed June 27, 1977)

Notice is given that Gulf Oil Corporation, one of the appellees, appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland filed on February 18, 1977, upholding the constitutionality of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, and reversing the final decree of the Circuit Court for Anne Arundel County entered on January 27, 1976. Motions for reconsideration and stay of mandate were denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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In The
Circuit Court For Anne Arundel County

Equity No. 22,562

Ashland Oil, Inc.,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Ashland Oil, Inc.
(Filed July 1, 1977)

Notice is hereby given that Ashland Oil, Inc., one of the plaintiffs in the above-captioned action, hereby appeals to the Supreme Court of the United States from the decision of the Court of Appeals of Maryland entered on February 18, 1977 reversing the decision of this Court and remanding the case for entry of a judgment in accordance with its opinion, which decision became final upon the filing of a supplementary opinion by the Maryland Court of Appeals on April 13, 1977 denying plaintiff's motion for reconsideration. The appeal is from that part of the decision applying to Paragraphs B and C of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975.

Pursuant to Rule 877 of the Maryland Rules of Procedure, the record in these actions is in the possession of this Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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In The
Court of Appeals of Maryland

September Term, 1976

No. 10

Governor of The State of Maryland, et al.,
Appellants

v.

Exxon Corporation, et al.,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

By Ashland Oil, Inc.

(Filed July 1, 1977)

Notice is hereby given that Ashland Oil, Inc., one of the appellees in the above-captioned action, hereby appeals to the Supreme Court of the United States from the final judgment of this Court, reversing the judgment of the Circuit Court for Anne Arundel County and upholding Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975 (the "Act"). The appeal is from that part of the decision applying to Paragraphs B and C of the Act. The judgment of the Court of Appeals of Maryland was entered on February 18, 1977, and appellee's motion for reconsideration was denied on April 13, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: July 1, 1977

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APPENDIX F

Maryland Gasoline Products Marketing Act, Maryland Annotated Code, Commercial Law Article, Section 11-301 *et seq.*:

§ 11-301. Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Dealer.* — (1) "Dealer" means a person engaged in the retail sale of gasoline products under a marketing agreement, at least 30 percent of whose gross revenue is derived from the retail sale of gasoline products.

(2) "Dealer" does not include an employee of a distributor.

(c) *Distributor.* — (1) "Distributor" means a person who:

(i) Engages in the sale, consignment, or distribution of gasoline products through retail outlets which he owns or leases; and

(ii) Maintains an oral or written contractual relationship with a dealer for the sale of the products.

(2) "Distributor" includes any subsidiary or affiliated corporation in which a distributor holds at least 30 percent voting control.

(d) *Marketing agreement.* — "Marketing agreement" means an oral or written agreement between a distributor and a dealer under which the dealer is granted the right, for the purpose of engaging in the retail sale of gasoline products supplied by the distributor, to:

(1) Use a trademark, trade name, service mark, or other identifying symbol or name owned by the distributor; or

(2) Occupy premises owned, leased, or controlled by the distributor.

(e) *Person.* — "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(f) *Retail sale.* — "Retail sale" means the sale of a product for purposes other than resale.

§ 11-302. Legislative declaration; statement of public policy.

(a) *Legislative finding and declaration.* — The General Assembly finds and declares that since the distribution and sale through marketing arrangements of petroleum products in the State vitally affect the economy of the State, and its public interest, welfare, and transportation, it is necessary to define the relationships and responsibilities of the parties to certain agreements pertaining to these marketing arrangements.

(b) *Statement of public policy.* — This subtitle constitutes a statement of the public policy of the State.

§ 11-303. Information to be given by distributor to prospective dealer.

Before any marketing agreement is concluded, a distributor shall disclose fully to a prospective dealer the following information:

(1) Any gallonage history of the location under negotiation for the shorter of:

(i) The three-year period immediately past; or

(ii) The entire period during which the location has been supplied by the distributor;

(2) The name, last known address, and reason for the termination of the marketing agreement of each person who was a dealer at the location during:

(i) The five-year period immediately past; or

(ii) The entire period during which the location has been supplied by the distributor;

(3) Any commitment for the sale, demolition, or other disposition of the location;

(4) Any training program and any specific goods and services which the distributor will provide for and to the dealer;

(5) Any obligation which will be required of the dealer;

(6) Any restriction on the sale, transfer, and termination of the agreement; and

(7) The total amount of any cash deposit required, any amount of interest to be paid on the deposit, and the conditions for the return of the deposit.

§ 11-304. Marketing agreement subject to certain provisions.

(a) *In general.* — Every marketing agreement is subject to the provisions of this section, whether or not expressly set forth in the agreement.

(b) *Dealer's right to cancel.* — (1) Until midnight of the seventh business day after the day a marketing agreement is signed or entered into, the dealer may cancel it by giving written notice of cancellation to the distributor in person or by registered or certified mail.

(2) Within 10 days after delivery of the notice of cancellation, the dealer shall return to the distributor full possession of any service station, location, money, equipment, or merchandise loaned, sold, or delivered under the marketing agreement to the dealer by the distributor.

(3) The distributor shall give the dealer full credit or its cash equivalent for all money, equipment, and merchandise returned.

(c) *Price setting.* — The distributor may not set or maintain or attempt to set or maintain the price at which the dealer sells any product, and the price of any product may not be subject to enforcement or coercion by the distributor in any way. However, the distributor

may counsel with the dealer concerning prices and may suggest prices to him.

(d) *Hours of business.* — A distributor may only require a dealer to keep his retail outlet open for business for a specified number of hours per day or days per week when this requirement is negotiated in good faith by both parties and arrived at in mutual agreement and it is on the basis of a bona fide business need.

(e) *Promotions.* — The distributor may not require the dealer to use any promotion, premium, coupon, give-away, or rebate in the operation of the business. However, if not otherwise prohibited by law, the dealer may participate in a promotional, premium, coupon, give-away, or rebate program sponsored by the distributor.

(f) *Notice of intent not to renew.* — A party who intends not to renew a marketing agreement shall give notice of his intent to the party at least 90 days before the expiration of the term of the marketing agreement.

(g) *Distributor may not unreasonably withhold certain consents.* — The distributor may not unreasonably withhold his consent to any assignment, transfer, sale, or renewal of a marketing agreement.

(h) *Repurchase on termination or cancellation.* — (1) Except with respect to a cancellation to which subsection (b) of this section applies, within 30 days after the date a marketing agreement is terminated or cancelled, whether by mutual agreement or otherwise, the distributor shall repurchase from the dealer at the then current wholesale price all merchantable products purchased by the dealer from the distributor.

(2) The distributor may apply the proceeds of any repurchased product against any existing debt owed by the dealer to the distributor.

(3) The obligation to repurchase under this subsection is enforceable only to the extent that there are no

other valid claims or liens against the products by or on behalf of other creditors of the dealer.

(i) *Payment for goodwill.* — (1) In addition to the provisions of subsection (h) of this section, if, without the written consent of the dealer, the distributor terminates, cancels, or unreasonably refuses to renew the marketing agreement, the distributor shall pay to the dealer the full value of any business goodwill which the dealer enjoys at the time he is notified of the termination, cancellation, or refusal to renew.

(2) The distributor shall make the payment required by this subsection within 30 days from the effective date of the termination, cancellation, or refusal to renew.

(3) This subsection does not apply if the dealer materially breaches the marketing agreement.

(j) *Agreement may not waive certain rights.* — The marketing agreement may not waive the right of either party to trial by jury or interposition of counter-claims or cross-claims.

(k) *Service station lease providing for minimum monthly rental.* — A clause in any lease or contract from a producer or refiner to a dealer for the use of a retail service station providing for a minimum monthly rental based on a certain volume of sales is not enforceable to the extent the minimum rent exceeds a sum equal to the minimum rent provided for in the lease or contract times a fraction, the denominator of which is the number of gallons of gasoline on which the minimum rent is based and the numerator of which is the number of gallons of gasoline made available by the producer or refiner to the dealer for that month.

§ 11-305. Defenses to action based on termination or cancellation of marketing agreement.

Subject to the notice requirements of § 11-306, in any action filed under this subtitle which is based on a termination or cancellation of a marketing agreement,

it is a defense that the marketing agreement was terminated or cancelled:

(1) By mutual agreement of the parties;

(2) Because of the bankruptcy or insolvency of the dealer;

(3) Because the dealer failed to comply with an express requirement of the marketing agreement; or

(4) Because the dealer failed to act in good faith in carrying out the terms of the marketing agreement.

§ 11-306. Notice of intent required to raise defenses.

(a) *Notice required to raise defense.* — A party to a marketing agreement may not raise any defense set out in § 11-305 unless he gives written notice to the other party of his intent to terminate or cancel the agreement. This notice shall be given in person or by registered or certified mail at least 60 days before the date on which he intends to terminate or cancel it.

(b) *When notice not required.* — The 60-day notice is not required if at the time of termination or cancellation of the marketing agreement any of the following is proven:

(1) Criminal misconduct;

(2) Fraud;

(3) Abandonment;

(4) Bankruptcy or insolvency of the dealer;

(5) Adulteration of product; or

(6) Giving a check which is dishonored for insufficient funds.

(c) *Notice by registered or certified mail.* — If notice is given by registered or certified mail, it shall be effective on the date of mailing.

§ 11-307. Remedies.

Any person who violates any provision of this subtitle is liable for damages caused by the violation

and is subject to the other legal or equitable remedies available to the party injured by the violation.

§ 11-308. Short title.

This subtitle may be cited as the Maryland Gasoline Products Marketing Act.

Maryland Unfair Sales Act, Maryland Annotated Code, Commercial Law Article, Section 11-401 *et seq.*:

§ 11-401. Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Cost to the retailer.* — "Cost to the retailer" means the lesser of the invoice cost or the replacement cost of the merchandise to the retailer; minus any trade discount other than a customary discount for cash; plus

(1) A freight charge otherwise not included in the invoice cost or the replacement cost of the merchandise;

(2) A cartage cost to the retail outlet if performed or paid for by the retailer, which, in the absence of proof of a lesser cost, is 0.75 percent of the cost to the retailer, after adding the freight charge but before adding the cartage cost and any markup;

(3) A markup to cover in part the cost of doing business, which, in the absence of proof of a lesser cost, is 5 percent of the cost to the retailer, after adding the freight charge and the cartage cost but before adding any markup; and

(4) An additional markup to cover in part the cost of doing business which, in the absence of proof of a lesser cost, is 2 percent of the cost to the retailer, after adding the freight charge and the cartage cost but before adding any markup, if the retailer:

(i) Buys at wholesale or buys directly from the manufacturer or the agent or broker of the manufacturer; and

(ii) Receives a wholesale price or discount on merchandise for retail sale.

(c) *Cost to the wholesaler.* — "Cost to the wholesaler" means the lesser of the invoice cost or the replacement cost of the merchandise to the wholesaler; minus any discount other than a customary discount for cash; plus:

(1) A freight charge otherwise not included in the invoice cost or the replacement cost of the merchandise;

(2) A cartage cost to the retail outlet if performed or paid for by the wholesaler, which, in the absence of proof of a lesser cost, is 0.75 percent of the cost to the wholesaler, after adding the freight charge but before adding the cartage cost and any markup; and

(3) A markup to cover in part the cost of doing business, which, in the absence of proof of a lesser cost, is 2 percent of the cost to the wholesaler, after adding the freight charge and the cartage cost but before adding any markup.

(d) *Person.* — "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(e) *Replacement cost.* — "Replacement cost" means the cost per unit for which the merchandise sold or offered for sale could have been bought by the wholesaler or retailer at any time within 30 days before the date of sale or the date on which it is offered for sale by him if bought in the same quantity as his last purchase of the merchandise.

(f) *Retailer.* — (1) "Retailer" means a person engaged in the business of making retail sales within the state.

(2) If the person is engaged in the business of making both retail sales and wholesale sales, the word applies only to the retail sales portion of the business.

(g) *Retail sale.* — (1) "Retail sale" means any transfer of title to tangible personal property for valuable consideration and in the ordinary course of trade or in the usual conduct of the seller's business, to a purchaser for consumption or use other than resale, further processing, or manufacturing.

(2) "Retail sale" includes any such transfer of the property whereby title is retained by the seller as security for the payment of the purchase price.

(h) *Wholesaler.* — (1) "Wholesaler" means a person engaged in the business of making wholesale sales within the state.

(2) If a person is engaged in the business of making both wholesale sales and retail sales, the word applies only to the wholesale sales portion of the business.

(i) *Wholesale sale.* — (1) "Wholesale sale" means any transfer of title to tangible personal property for valuable consideration and in the ordinary course of trade or the usual conduct of the seller's business, to a purchaser for the purpose of resale, further processing, or manufacturing.

(2) "Wholesale sale" includes any such transfer of the property whereby title is retained by the seller as security for the payment of the purchase price.

§ 11-402. Exceptions.

This subtitle does not apply to an advertisement, offer to sell, retail sale, or wholesale sale, if the merchandise:

(1) Is sold in a bona fide clearance sale and is so advertised and marked;

(2) Must be sold promptly in order to prevent loss;

(3) Is imperfect, damaged, or being discontinued and is so advertised and marked;

(4) Is sold on the final liquidation of a business;

(5) Is sold for charitable purposes or to relief agencies;

(6) Is sold on contract to a department of a government or governmental institution;

(7) Is sold by an officer acting under the order or direction of a court; or

§ 11-403. Advertised, offered for sale, or sold.

For the purposes of this subtitle, if an item of merchandise is advertised, offered for sale, or sold with any other item at a combined price, or is advertised, offered as a gift, or given with the sale of any other item, all of the items are considered to be advertised, offered for sale, or sold. The cost to the wholesaler and the cost to the retailer, as the case may be, of each item is governed by § 11-401 (b) and (c), respectively, of this subtitle.

§ 11-404. Sale at less than cost prohibited.

(a) *Prohibition.* — A retailer or wholesaler with intent to injure a competitor or to destroy competition may not advertise, offer to sell, or sell at retail sale or wholesale sale any item of merchandise at less than its cost to the retailer or its cost to the wholesaler, respectively.

(b) *Evidence.* — Proof of an advertisement, offer to sell, or sale of an item of merchandise by a retailer or wholesaler at less than its cost to the retailer or its cost to the wholesaler, respectively, is prima facie evidence of intent to injure a competitor or to destroy competition.

§ 11-405. Injunction.

On complaint of a person who claims to be injured, a circuit court has jurisdiction to enjoin a retailer or wholesaler from the commission of an act prohibited by this subtitle.

§ 11-406. Short title.

This subtitle may be cited as the Maryland Unfair Sales Act.

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47, and 77-64

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY,

SHELL OIL COMPANY,

CONTINENTAL OIL COMPANY and KAYO OIL COMPANY,

GULF OIL CORPORATION,

ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC. and PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPENDIX

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PROBABLE JURISDICTION NOTED OCTOBER 3, 1977

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OPINIONS:

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Memorandum of Opinion of the Circuit Court for Anne Arundel County dated January 27, 1976 appears in the Joint Appendix to Jursidictional Statements at pages 53a to 134a.

Opinion of the Court of Appeals of Maryland dated February 18, 1977 is printed at 279 Md. 410 (advance reports) and at 370 A.2d 1102 and appears in the Joint Appendix to Jurisdictional Statements at pages 1a to 44a.

Supplemental Opinion of the Court of Appeals of Maryland dated April 13, 1977 is printed at 279 Md. 456 (advance reports) and at 372 A.2d 237 and appears in the Joint Appendix to Jurisdictional Statements at pages 45a to 48a.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

Equity Nos. 22,069; 22,091; 22,216; 22,461; 22,502; 22,562 and 22,551

June 17, 1974	Bill of Complaint for Declaratory Judgment and Injunctive Relief and Exhibit (Exxon Corporation)
June 28, 1974	Bill of Complaint for Declaratory Judgment and Injunctive Relief and Exhibit (Continental Oil Company and Kayo Oil Company)
July 5, 1974	Answer (to Exxon Bill of Complaint)
July 8, 1974	Stipulation regarding Stay of Enforcement
August 5, 1974	Answer (to Continental and Kayo Bill of Complaint)
September 3, 1974	Bill of Complaint for Declaratory Judgment and Injunctive Relief and Exhibit (Shell Oil Company)
October 22, 1974	Answer (to Shell Bill of Complaint)
October 25, 1974	Amendment to Answer (to Shell Bill of Complaint)

November 14, 1974	Order consolidating Exxon, Continental and Shell cases
January 23, 1975	Bill of Complaint for Declaratory Judgment and Injunctive Relief (Gulf Oil Corporation)
February 3, 1975	Answer (to Gulf Bill of Complaint)
February 5, 1975	Order consolidating Gulf with Exxon, Continental and Shell
February 14, 1975	Bill of Complaint for Declaratory Judgment and Injunctive Relief (Phillips Petroleum Company)
March 5, 1975	Answer (to Phillips Bill of Complaint)
March 20, 1975	Bill of Complaint for Declaratory Decree and Injunctive Relief and Exhibit (Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.)
March 26, 1975	Bill of Complaint for Declaratory Judgment and Injunctive Relief (Ashland Oil, Inc.)
March 31, 1975	Order consolidating Ashland with Exxon, Continental, Shell and Gulf
March 31, 1975	Order consolidating Phillips with Exxon, Continental, Shell, Gulf and Ashland
April 1, 1975	Answer (to Petroleum Marketing and Commonwealth Bill of Complaint)
April 8, 1975	Answer (to Ashland Bill of Complaint)
May 5, 1975	Case called for Hearing on Pre-Trial Conference in Open Court before Judge E. Mackall Childs. Counsel heard, Court signed order

May 5, 1975	Order Entered at Pre-Trial Conference regarding non-enforcement of the provisions of Chapter 854 of the Laws of Maryland pending outcome of the case
May 20, 1975	Joinder of Ashland in Pre-Trial Stipulations
May 29, 1975	Shell's Motion for Partial Summary Judgment as to Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974, Memorandum of Points and Authorities In Support of Motion and Affidavit of Walter D. Naughton
May 29, 1975	Exxon's Motion for Partial Summary Judgment as to Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974 and Memorandum in support thereof
June 19, 1975	Gulf's Motion for Partial Summary Judgment as to Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974, and Affidavit
July 7, 1975	Answer to Motions for Partial Summary Judgment of Plaintiffs Exxon, Shell, and Gulf
July 7, 1975	Defendants' Memorandum in Support of Their Response and Opposition to Plaintiffs' Motions for Partial Summary Judgment

July 7, 1975	Affidavit of James M. Patterson, Ph.D.
July 28, 1975	Order consolidating Petroleum Marketing and Commonwealth with Exxon, Continental, Shell, Gulf, Phillips and Ashland
July 28, 1975	Joinder of Petroleum Marketing and Commonwealth in Pre-Trial Stipulations
August 11, 1975	Plaintiffs'(Shell, Continental, Kayo, Gulf, Phillips and Ashland) Motion for Partial Summary Judgment as to Paragraphs B and C of Chapter 854, Laws of Maryland, 1974
August 11, 1975	Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment
August 22, 1975	Case called for Hearing on Motion of Exxon, Shell and Gulf for Partial Summary Judgment as to Paragraphs D and F of Chapter 854, in Open Court before Judge E. Mackall Childs, Counsel heard. Court will hold under advisement. Argument on Paragraph F delayed pending action on Federal Allocation Act
September 9, 1975	Motion of Day Enterprises, Inc., *et al.* for Leave to Appear and Present Memoranda and Argument as Amicus Curiae and Exhibits
September 9, 1975	Memorandum of Amici Curiae in support of the Constitutional validity of Article 56 Sections 157

	E(B) and (C) of the Annotated Code of Maryland
September 22, 1975	Defendants' Answer to Motion for Partial Summary Judgment filed by the Plaintiffs Shell, Continental, Kayo, Gulf, Phillips, and Ashland and Memorandum of law in support of Defendants' Answer
October 9, 1975	Pre-Trial Order and appendices A, B, C, D, E and F
October 10, 1975	Appendix G to Pre-Trial Order
October 14, 1975	Case called for Hearing on Merits in Open Court before Judge E. Mackall Childs. Prior to Testimony, Court orally granted Plaintiffs' Motion for Partial Summary Judgment. Testimony taken. Case continued to October 15, 1975
October 14, 1975	Memorandum declaring Paragraph D of Chapter 854 of the Laws of Maryland, 1974, invalid
October 15, 1975	Case continued on merits in Open Court before Judge E. Mackall Childs. Testimony taken. Case continued to October 16, 1975
October 16, 1975	Case continued on merits in Open Court before Judge E. Mackall Childs. Testimony taken. At conclusion of Plaintiffs' testimony, State moved to stay proceedings pending appeal of Court's ruling as to Paragraph "D". Court denied motion. Testimony continued to October 17, 1975

October 17, 1975	Case continued on Merits in Open Court before Judge E. Mackall Childs. Testimony taken. State continued case to October 20, 1975 for purpose of oral arguments of Counsel
October 20, 1975	Case continued on Merits in Open Court before Judge E. Mackall Childs. Counsel heard. Court will hold under advisement
January 27, 1976	Memorandum of Opinion by Judge E. Mackall Childs declaring Chapter 854 of the Laws of Maryland, 1974 and Chapter 608 of the Laws of Maryland, 1975 unconstitutional and void
February 2, 1976	Order for Appeal by Marvin Mandel, Governor, *et al.*
February 23, 1976	Motion of Defendants to Stay the Judgment of Court entered January 27, 1976 and Memorandum of Points and Authorities
March 15, 1976	Stipulation and Consent Order granting continuance of Order of Court entered May 5, 1975
April 18, 1977	Order by Judge E. Mackall Childs reversing and dissolving Declaration and Injunction dated January 27, 1976
June 23, 1977	Notice of Appeal to the Supreme Court of the United States by Shell

June 27, 1977	Notice of Appeal to the Supreme Court of the United States by Exxon and Phillips
June 27, 1977	Notice of Appeal to the Supreme Court of the United States by Continental and Kayo
June 27, 1977	Notice of Appeal to the Supreme Court of the United States by Gulf
July 1, 1977	Notice of Appeal to the Supreme Court of the United States by Ashland
July 11, 1977	Notice of Appeal to the Supreme Court of the United States by Petroleum Marketing and Commonwealth Oil

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COURT OF APPEALS OF MARYLAND

September Term, 1976

No. 10

February 17, 1976	Petition for Writ of Certiorari to the Court of Special Appeals of Maryland
April 5, 1976	Order Granting Writ of Certiorari
September 15, 1976	Oral Argument
February 18, 1977	Court of Appeals of Maryland Opinion and Judgment by J. Eldridge

March 17, 1977	Motion for Stay of Mandate, To Prohibit Enforcement of Chapter 854 of the Laws of Maryland, 1974, as Amended by Chapter 608 of the Laws of Maryland, 1975, and For Other Relief (and Proposed Order)
March 18, 1977	Motion for Reconsideration by Exxon Corporation, Shell Oil Company, Gulf Oil Corporation, and Phillips Petroleum Company
March 18, 1977	Motion for Reconsideration by Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.
March 18, 1977	Motion for Reconsideration by Continental Oil Company and Kayo Oil Company
March 21, 1977	Motion for Reconsideration by Ashland Oil, Inc.
March 24, 1977	Answer of Appellants to Motion for Stay of Mandate, to Prohibit Enforcement of Chapter 854 of the Laws of Maryland, 1974, as Amended by Chapter 608 of the Laws of Maryland, 1975, and For Other Relief
April 13, 1977	Opinion by J. Eldridge denying Motions for Reconsideration and Motion for Stay of Mandate
April 13, 1977	Mandate

June 23, 1977	Notice of Appeal to the Supreme Court of the United States of Shell Oil Company
June 27, 1977	Notice of Appeal to the Supreme Court of the United States of Exxon Corporation and Phillips Petroleum Company
June 27, 1977	Notice of Appeal to the Supreme Court of the United States of Continental Oil Company and Kayo Oil Company
June 27, 1977	Notice of Appeal to the Supreme Court of the United States of Gulf Oil Corporation
June 29, 1977	Amended Notice of Appeal to the Supreme Court of the United States of Exxon Corporation and Phillips Petroleum Company
July 1, 1977	Notice of Appeal to the Supreme Court of the United States of Ashland Oil, Inc.
July 11, 1977	Notice of Appeal to the Supreme Court of the United States of Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.

In the Circuit Court for Anne Arundel County

Equity No. 22,069

Exxon Corporation,

Plaintiff,

v.

Marvin Mandel, Governor, et al.,

Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed June 17, 1974

Exxon Corporation ("Exxon"), plaintiff herein, by its attorneys, brings this action under the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Exxon declares and alleges as follows:

The Parties

1. Exxon, incorporated under the laws of the State of New Jersey, is a producer and refiner of petroleum

products and owns and operates retail service stations in the State of Maryland. Exxon believes it is the leading supplier of gasoline in Maryland selling to dealers, wholesalers, the public and others approximately 19 percent of all the gasoline sold in Maryland. All of the gasoline sold by Exxon in Maryland is transported into the state from refineries located beyond the boundaries of the state.

2. Exxon sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail level both in local markets in Maryland and to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

3. There are approximately 483 independent dealer stations in Maryland buying Exxon branded gasoline directly from Exxon. In addition, Exxon has 35 company-operated stations in Maryland. Of the 35 company-operated stations, 12 are Exxon "Car Care Centers." In addition to marketing gasoline, Car Care Centers sell automobile products, such as tires, batteries and accessories, and provide a complete range of automobile maintenance and repair services. Each Car Care Center requires large initial and sustained capital investment in land, buildings and equipment.

4. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

5. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

7. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

8. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

9. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). A copy of the Act is attached hereto as Plaintiff's Exhibit No. 1. The Act becomes effective July 1, 1974 and amends Article 56, §157E by adding to §157E the following provisions:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

Constitutional Defects in the Act

10. As more fully set forth below, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. The Act bears no substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature and therefore goes beyond the police power of the State and denies to Exxon due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from engaging in certain lawful business activities, i.e. the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies plaintiff, and others

similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating certain pricing and distribution practices of producers, refiners, and wholesalers, without regulating the same practices by other persons or business entities, denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of plaintiff's substantial investment in retail service stations and a part or all of its return on investment without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of the Treasury by the Act affords no protection to the plaintiff against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that plaintiff can determine whether or not it is subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

i. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

The Act Denies Plaintiff Due Process of Law and Is Discriminatory

11. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974 and, in prohibiting producers or refiners from operating retail service stations after July 1, 1975, the Act requires plaintiff and others similarly situated to divorce themselves totally from the retail service station business. Plaintiff has been in the retail service station business in Maryland for over twenty years. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no probative evidence to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings.

12. By prohibiting refiners and producers from operating retail service stations, the Act removes a class

of competitor from not only the retail gasoline service station market, but also the increasingly significant automobile service and repair market and the retail market for such products as tires, batteries, and automobile accessories. Further, by removing producers and refiners from the retail gasoline market and by requiring producers, refiners, and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all retail service station dealers across the State, regardless of the relevant trading area, the opportunity for normal and lawful price competition is in fact restricted by the Act for the benefit of some dealers.

13. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Existing state and federal law, including other legislation enacted at the 1974 Session of the General Assembly (see Chapter 852), provide for far less restrictive alternatives for achieving any such legitimate objective. Thus, the means selected by the General Assembly bear no real and substantial relationship to any legitimate object sought to be obtained.

The Act Constitutes an Unconstitutional Taking

14. By prohibiting refiners and producers from operating service stations in the State of Maryland, the Act denies Exxon the right to earn a reasonable rate of return on its investment and takes Exxon's property without compensation and for private use.

15. The Act establishes an arbitrary July 1, 1975 divestiture date, within which one-year period Exxon believes that it will be difficult, if not impossible, to enter

into satisfactory contractual arrangements with suitable dealers. Exxon will lose substantial portions of its investment in those service stations which will have to be closed if satisfactory arrangements with a dealer cannot be worked out prior to the imposed deadline.

The Act Constitutes an Unlawful Delegation of Authority

16. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "permit reasonable exceptions to the divestiture dates after considering all of the relevant facts. . . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Exxon from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

The Act is Unconstitutionally Vague

17. Paragraph D of the Act provides that every producer, refiner and wholesaler shall extend all "voluntary allowances" uniformly to all "dealers supplied." The term "voluntary allowances" is the critical operative language of that paragraph of the Act and is not defined. It is unclear what is encompassed by that term. Nor is it clear what dealers are encompassed by the term "dealers supplied." In addition, the Act provides no guidance as to the meaning of the word "uniformly," a word used in

Paragraphs D, E, and F of the Act. The ambiguity and vagueness of the terms may produce results that it is unlikely that the Legislature wished to produce. In light of the severe criminal penalties imposed by Article 56, §157F, Annotated Code of Maryland (1973 Cumulative Supplement), which are applicable to the Act amending §157E, and the vagueness of the terms referred to, the Act is unconstitutionally vague.

The Act is Preempted by the Federal Emergency Petroleum Allocation Act of 1973

18. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office (the "FEO") pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

19. Under 10 C.F.R. §212.82(f) and §212.93(a) of the Petroleum Allocation and Price Regulations, the base price for sales for both refiners and resellers "is the

weighted average price at which the item was lawfully priced in transactions with the *class of purchaser* concerned on May 15, 1973" (with adjustments not pertinent here). (Emphasis added.) Sections 212.82(f) and 212.93(d) provide that in computing the base price charged to a "class of purchaser" a refiner or reseller "may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." "Class of Purchaser" is defined in § 12.31 to mean:

> purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

"Customary price differential" includes:

> a price distinction based on a discount, *allowance*, add-on, premium, and an extra base on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery. (Emphasis added)

The Regulations thus expressly require refiners and sellers to reflect any allowances in effect on May 15, 1973 in determining the base price charged to their purchasers, and the Regulations expressly sanction price differentials and different allowances based on such differences as volume, location, or type of purchaser. The requirement of Paragraph D of the Act, amending Article 56, §157E, that all voluntary allowances be extended "uniformly" is, therefore, in conflict with the Regulations and is preempted by them in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973.

20. Paragraph D of the Act amending §157E of Article 56 also conflicts with another section of the Petroleum Allocation and Price Regulations. 10 C.F.R.

§210.62 provides that a supplier may not "modify any . . . *normal business practice* so as to result in circumvention of any provision of this chapter." (Emphasis added.) The granting of legally sanctioned price differentials and allowances is a normal business practice. Compliance with Paragraph D's requirement that allowances be extended uniformly would, therefore, be a deviation from a normal business practice and would have the effect of frustrating or impairing the objectives of the Regulations to the extent that the price differentials and allowances are part of the mechanism sanctioned by the Regulations for controlling the price of petroleum products.

21. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a

purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with the Regulations and is preempted by them in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973.

The Act Conflicts with the Robinson-Patman Act, 15 U.S.C. §13

22. The requirement of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products "extend all voluntary allowances uniformly to all retail service station dealers supplied" conflicts with both the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) (part of the Maryland anti-trust law). Under both the federal and state anti-trust laws, unlawful price discrimination can only result from a price difference which adversely affects competition. Paragraph D of the Act requires all allowances to be made on a state-wide basis regardless of

any rationale or justification for the granting of any form of allowance on a more limited geographic basis. This provision of the Act therefore conflicts with and is preempted by the federal law.

23. Exxon has no adequate remedy at law.

24. In view of the aforementioned allegations, an actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Exxon respectfully prays that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgment Act, and set this case down for prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award plaintiff declaratory relief pursuant to the Uniform Declaratory Judgment Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and

Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

/s/ William L. Marbury,
/s/ Lewis A. Noonberg,
Piper & Marbury
Attorneys for the Plaintiff.

Of Counsel:
Richard P. Delaney.

PLAINTIFF'S EXHIBIT NO. 1

Certified to be a true and correct copy of Chapter 854 of the Acts of the General Assembly of Maryland 1974.

/s/Carl N. Everstine
Carl N. Everstine, Director
State Department of Legislative

SENATE BILL No. 465. Reference

Introduced by Senator Pine (Departmental)

Read and Examined by Proof Reader:

_____
Proof Reader.

_____
Proof Reader.

Sealed with the Great Seal and presented to the Governor, for his approval this _____ day of _____ at _____ o'clock, _____ m.

Secretary

APPROVED

By the Governor
May 31 '74

CHAPTER 854

AN ACT concerning

Licenses – Retail Service Stations

FOR the purpose of prohibiting producers[[,]] *or* refiners[[, and wholesalers]] of petroleum products from operating retail service stations *permitting the Comptroller to adopt rules or regulations which define the circumstances on which a producer or refiner may operate temporarily a previously dealer-operated station, requiring the Comptroller to permit certain exceptions to the divestiture dates of considering all of the relevant facts and reaching certain conclusions* and regulating voluntary allowances and rental agreements.

BY repealing and re-enacting, with amendments,

Article 56 – Licenses
Section 157E
Annotated Code of Maryland
(1972 Replacement Volume and 1973 Supplement)

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW. [Brackets] indicate matter stricken from existing law. [[Double brackets]] indicate matter stricken out of bill. *Underlining* indicates amendments to bill.

SENATE BILL No. 465

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section 157E of Article 56 – Licenses, of the Annotated Code of

Maryland (1972 Replacement Volume and 1973 Supplement) be and it is hereby repealed and re-enacted, with amendments, to read as follows:

Article 56 – Licenses

157E.

(A) For the purpose of this law all gasoline and special fuels sold or offered or exposed for sale shall be subject to inspection and analysis as hereinafter provided. All motor fuel wholesalers, diesel fuel sellers, heating oil distributors, manufacturers, refiners, jobbers and retail service station dealer before selling or offering for sale any gasoline: other motor vehicle fuels, or special fuels under whatever name designated for power and heating purposes shall file with the Comptroller of the Treasury a declaration or statement that they desire to sell such products in this State and shall furnish the name, brand or trademark of the products which they desire to sell together with the name and address of the supplier thereof and that all such products are in conformity with the specifications established by the Comptroller of the Treasury, as purchased from the supplier and he will make no alteration to any such product received from the supplier.

(B) AFTER JULY 1, 1974, NO PRODUCER[[,]] *OR* REFINER [[OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPEN AND OPERATE WITH COMPANY PERSONNEL, A RETAIL SERVICE STATION UNDER A MAJOR BRAND, SECONDARY OR UNBRANDED STATION]] *OF PETROLEUM PRODUCTS SHALL OPEN A MAJOR BRAND, SECONDARY BRAND OR UNBRANDED RETAIL SERVICE STATION IN THE STATE OF MARYLAND, AND OPERATE IT WITH COMPANY PERSONNEL, A SUBSIDIARY COMPANY, OR A COMMISSIONED AGENT.*

(C) AFTER JULY 1, 1975, NO PRODUCER[[,]] *OR* REFINER [[OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPERATE ANY CLASS OF RETAIL SERVICE STATION IN THE STATE OF MARYLAND]] *OF PETROLEUM PRODUCTS SHALL OPERATE A MAJOR BRAND, SECONDARY BRAND, OR UNBRANDED RETAIL SERVICE STATION IN THE STATE OF MARYLAND, WITH COMPANY PERSONNEL, A SUBSIDIARY COMPANY, OR A COMMISSIONED AGENT.*

(D) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL EXTEND ALL VOLUNTARY ALLOWANCES UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(E) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL APPLY ALL EQUIPMENT RENTALS UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(F) EVERY PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL APPORTION UNIFORMLY ALL GASOLINE AND SPECIAL FUELS TO ALL RETAIL SERVICE STATION DEALERS DURING PERIODS OF SHORTAGES ON AN EQUITABLE BASIS, AND SHALL NOT DISCRIMINATE AMONG THE DEALERS IN THEIR ALLOTMENTS.

(G) THE COMPTROLLER MAY ADOPT RULES OR REGULATIONS DEFINING THE CIRCUMSTANCES IN WHICH A PRODUCER OR REFINER TEMPORARILY MAY OPERATE A PREVIOUSLY DEALER-OPERATED STATION.

(H) THE COMPTROLLER MAY PERMIT REASONABLE EXCEPTIONS TO THE DIVESTITURE DATES SPECIFIED BY THIS SECTION AFTER CONSIDERING ALL OF THE RELEVANT FACTS AND REACHING REASONABLE CONCLUSIONS BASED UPON THOSE FACTS.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1974.

Approved:

_____
Governor.

_____
President of the Senate.

_____
Speaker of the House of Delegates.

ANSWER
(To Exxon Bill of Complaint)

Filed July 5, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit the allegations contained in paragraph 1.

2. That they admit that Exxon sells gasoline and other petroleum products at the retail level in Maryland, but are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2.

3. That they admit the allegations contained in paragraph 3 but are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the last sentence in paragraph 3 of said Bill.

4. That they admit the allegations contained in paragraphs 4 through 9, inclusive.

5. That they deny the allegations contained in paragraph 10 of said Bill, specifically answering:

(a) That the Act bears a substantial relation to the economic welfare and continuing existence of the retail service station dealers and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State.

(b) That the Act does not deny plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution because the classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman.

(c) That the Act does not constitute a taking of plaintiff's property without compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

(d) That the Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

(e) That the Act is not so vague as to deny plaintiff due process in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

(f) That the Act does not discriminate against nor unduly burden interstate commerce so as to be invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

(g) That the Act does not conflict with any Federal statute and, therefore, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

6.(a) That they deny the allegations contained in the first sentence of paragraph 11 and state that paragraphs (B) and (C) of Chapter 854 prevent a producer or refiner from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged.

(b) That they are without knowledge sufficient to form a belief as to the truth of the allegations contained in the second sentence of paragraph 11 of said Bill.

(c) That they deny the allegations contained in the third and fourth sentences of paragraph eleven. The Legislature, after hearing testimony of the tremendous financial influence and control exercise by the producers and refiners over the operation of retail service stations has deemed that it is in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

7. That they deny the allegations contained in paragraphs 12 through 14, inclusive, of said Bill.

8. That they admit that July 1, 1975 is established by the Act as the date by which divestiture must take place, but deny the other allegations contained in paragraph 15 of said Bill. That they state further that they have been advised and know of responsible and experienced retail service station dealers who are prepared to operate the Exxon Car Care Centers upon what they believe will be a profitable basis for Exxon and themselves provided that the terms of their leases from Exxon are negotiated at arms length and are fair and equitable to both lessee and lessor.

9. That they admit the allegations contained in the first two sentences of paragraph 16 and deny the allegations contained in the third and fourth sentences of paragraph 16.

10. That they admit the allegations contained in the first sentence of paragraph 17. That they admit the allegations of the second, fourth and fifth sentences of paragraph 17 in that the terms "voluntary allowances" and "dealers supplied" and "uniformly" are undefined by the Act, but deny that such terms are unclear as alleged in the third and fourth sentences of paragraph 17. That they further deny the allegations contained in the fifth, sixth and seventh sentences of paragraph 17 of said Bill.

11. That they admit the allegations contained in paragraph 18.

12. That they admit the allegations contained in the first five sentences of paragraph 19 as to the provisions of the Petroleum Allocation and Price Regulations but deny the allegations contained in the last sentence of paragraph 19 of said Bill because the effect of the federal regulations is to make any allowance extended by Exxon to any "class of purchaser" on said date mandatory for the duration of the regulations. Section D of the Act

refers solely to voluntary allowances and thus there is no conflict and no preemption under Section 6(b) of the Federal Emergency Petroleum Act.

13. That they deny the allegations contained in paragraph 20 as to any conflict between Chapter 854 and 10 C.F.R. §210.62. The complete sentence from which plaintiff has extracted its quotation and added its emphasis is as follows:

> "However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (e.g. COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this Chapter."

They also deny that the uniformity requirement of paragraph D of the Act in any way conflicts with 10 C.F.R. §210.62 because paragraph (b) of that regulation requires in part that "[n]o supplier shall engage in any form of discrimination among purchasers of any allocated product."

14. That they admit the allegations in paragraph 21 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act.

15. That they deny the allegations in paragraph 22 and say that the precise terms of paragraph D of the Act do not conflict with the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83 §38, Annotated Code of Maryland (1973 Cumulative Supplement) which prohibit anti-competitive pricing and practices. The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

16. That they admit paragraphs 23 and 24.

Further answering:

17. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market.

18. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Exxon can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

19. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sale but can make its profit through producing, refining, wholesaling and transportation. Consequently companies such as Exxon can afford to conduct their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

20. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Exxon have led to economic chaos in the retail service station business and impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

21. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Exxon can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars the turnover ratio and failure ratio of retail service station dealers is higher than any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a level that would otherwise have existed.

22. That they state that in this State the Gasoline Tax Division of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972 through December 31, 1973 and that there were 303 fewer service stations to serve the public at the end of the same period.

23. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems, lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July and August 1973. The Gasoline Tax Division found that the retail service stations that were company owned and operated had no difficulty in securing the gasoline they could sell whereas other retail dealers were not supplied with all of the gasoline they could sell. The Gasoline Tax Division also found that certain producers and refiners other than

Exxon had terminated leases of retail dealers and converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should not be issued, the Defendants respectfully pray that any stipulations entered into by either party pursuant to this action be vacated and that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch,
Attorney General,

/s/ Jon F. Oster,
Assistant Attorney General,
Attorneys for Defendants.

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

Equity No. 22,091

Continental Oil Company, et al.,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed June 28, 1974

Continental Oil Company ("Conoco") and Kayo Oil Company ("Kayo"), plaintiffs herein, by their attorneys, bring this action under the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Plaintiffs declare and allege as follows:

The Parties

1. Conoco, incorporated under the laws of the State of Delaware, is a producer and refiner of petroleum products, but does not operate branded retail service stations in the State of Maryland. Conoco does not sell branded gasoline to dealers or jobbers in Maryland. All of the gasoline sold by Conoco in Maryland is manufactured at Conoco's refinery at Westlake, Louisiana, and is then delivered into Conoco's Baltimore Terminal via the Colonial Pipe Line, a common carrier pipeline which operates in interstate commerce.

2. Kayo, incorporated under the laws of the State of Delaware, is a wholly owned subsidiary of Conoco, and owns and operates retail service stations in the State of Maryland. Kayo does not presently, nor has it ever, sold any gasoline to dealers or jobbers in Maryland. Kayo has always sold its gasoline to the motoring public directly through employee operated gasoline outlets. Kayo has never sold its gasoline to the motoring public through dealer operated service stations in Maryland or in any other state. All gasoline sold by Kayo in Maryland is sold to Kayo by its parent corporation, Conoco, and is transported into the state from a refinery located beyond the boundaries of the State of Maryland as described in paragraph one (1).

3. Kayo sells substantial quantities of gasoline and other petroleum products at the retail level both in local markets in Maryland and to persons, such as travelers, some of whom operate in interstate commerce.

4. Kayo has 15 company-operated stations in Maryland. Each such station operates as a limited service retail unit in dispensing gasoline to the motoring public. Although each retail unit requires a large investment for land, buildings and equipment, Kayo stations have

consistently sold gasoline at a lower cost to consumers than major branded dealers because of the cost efficiencies realized through its high volume limited service mode of operation. Kayo has been known throughout the industry as a "low price marketer", affording the motoring public a high quality product at a price consistently lower than most prevailing prices.

5. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

6. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against the persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

7. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

8. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the

Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

9. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

10. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). A copy of the Act is attached hereto as Plaintiffs' Exhibit No. 1. The Act becomes effective July 1, 1974 and amends Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

Constitutional Defects in the Act

11. As more fully set forth below, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. The Act bears no substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature and therefore goes beyond the police power of the State and denies to Conoco and Kayo due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from engaging in certain lawful business activities, i.e., the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies plaintiffs, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating distribution practices of producers, refiners, and wholesalers, without regulating the same practices by other persons or business entities denies plaintiff, and other similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of plaintiff Kayo's substantial investment in retail service stations and a part or all of Kayo's return on investment

without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of the Treasury by the Act affords no protection to the plaintiffs against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that plaintiffs can determine whether or not they are subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies plaintiffs due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is, therefore, invalid under the Supremacy Clause of Article VI of the United States Constitution.

The Act Denies Plaintiff Due Process of Law and is Discriminatory

12. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974, and, in prohibiting producers or refiners from operating

retail service stations after July 1, 1975, the Act requires plaintiffs and others similarly situated to divorce themselves totally from the direct operation of retail service station business. Kayo has been in the retail service station business in Maryland for approximately ten years. No valid public purpose is serviced by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no probative evidence to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morale or welfare of the citizens of the State, nor does the Act contain any such findings.

13. By prohibiting refiners and producers from operating retail service stations, the Act will remove from the retail gasoline service station market a class of competitor which has become a significant competitive factor in said market; that of the company-operated retail service station which passes the savings realized by streamlined operations along to the consumer. Because of Kayo's national marketing concept, that of company owned and operated retail gasoline stations, the Act will have the effect of forcing Kayo to dispose of its Maryland stations to buyers who might not find it economically feasible to continue operating the sites as retail gasoline outlets. The loss of even part of Kayo's Maryland stations will adversely affect the public in that there will be fewer distribution points at which the motoring public can conveniently purchase gasoline for lower than average prices. Further, by removing producers and refiners from the retail gasoline market, the opportunity for normal and lawful price competition is in fact restricted by the Act for the benefit of some dealers.

14. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Thus, the means selected by the General Assembly bear no real and substantial relationship to any legitimate object sought to be obtained.

The Act Constitutes an Unconstitutional Taking

15. By prohibiting refiners and producers from operating service stations in the State of Maryland, the Act denies Conoco and its subsidiary, Kayo, the right to earn a reasonable rate of return on its investment and takes plaintiffs' property without compensation and for private use.

16. All Kayo's stations were either built or remodeled as limited service, company operated outlets and are wholly unsuitable for dealer operations which require facilities for storage of tires, batteries and accessory inventories as well as facilities for the repair and service of automobiles. Based upon these facts and Kayo's concept of operation, Kayo will not be able to operate these stations with dealers and will be forced to dispose of the stations.

The Act Constitutes an Unlawful Delegation of Authority

17. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "permit

reasonable exceptions to the divestiture dates after considering all of the relevant facts . . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid plaintiffs from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

The Act is Unconstitutionally Vague

18. Paragraph F of the Act provides that every producer, refiner and wholesaler shall "apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments." It is unclear what is encompassed by the term "apportion uniformly". The Act provides no guidance as to the meaning of the term "apportion uniformly". The ambiguity and vagueness of that term may produce results that it is unlikely that the Legislature wished to produce. In light of the severe criminal penalties imposed by Article 56, §157F, Annotated Code of Maryland (1973 Cumulative Supplement), which are applicable to the Act amending §157E, and the vagueness of the term referred to, the Act is unconstitutionally vague.

The Act is Preempted by the Federal Emergency Petroleum Allocation Act of 1973

19. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory alloca-

tion of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office (the "FEO") pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

20. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10,

each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with the Regulations and is preempted by them in accordance with 6(b) of the Emergency Petroleum Allocation Act of 1973.

21. Plaintiffs have no adequate remedy at law.

22. In view of the aforementioned allegations, an actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act, and set this case down for prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award plaintiffs declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiffs, the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiffs, the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

/s/Wilbur D. Preston, Jr.

/s/Stanley B. Rohd

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ANSWER

(To Continental and Kayo Bill of Complaint)

Filed August 5, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief and each and every paragraph thereof, say:

1. They admit the allegations contained in the first sentence of paragraph 1. They have no knowledge of the allegations contained in the second sentence, however

they believe and therefore aver that Continental Oil Company ("Conoco") sells both premium and regular gasoline in the State of Maryland which is comingled under a terminal agreement with the Ashland Oil Company, and that since June 1, 1974, Conoco has entered into a terminal agreement with the Sun Oil Company to comingle unleaded regular gasoline. The Defendants deny the allegations contained in the third sentence of paragraph 1 that all of the gasoline sold by Conoco in Maryland is manufactured at Conoco's refinery at Westlake, Louisiana and state that Conoco has terminal and exchange agreements in Maryland with other oil companies and, therefore, its gasoline becomes fungible under the exchange agreements.

2. They admit the allegations contained in paragraph 2 except for the allegation that all of the gasoline sold by Kayo in Maryland has been refined at the Westlake refinery.

3. Answering paragraph 3, the Defendants state that Kayo's percentage of the Maryland market for the sale of gasoline and other petroleum products at the retail level is approximately one-half of one percent. The Defendants have no knowledge as to whether or not persons purchasing gasoline and other petroleum products from Kayo operate in interstate commerce.

4. The allegations contained in paragraph 4 are admitted, however, the Defendants state further that the reasons that Kayo can operate as a "low price marketer" are that it markets fungible gasoline and does not incur other cost factors such as providing service facilities, credit cards, advertising programs and additives.

5. They admit the allegations contained in paragraphs 5 through 10, inclusive.

6. They deny the allegations contained in paragraph 11 of said Bill, specifically answering:

(a) The Act bears a substantial relation to the economic welfare and continuing existence and employment of the independent retail service station dealers and their employees and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen. The Act reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State.

(b) The Act does not deny Plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution because the classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman.

(c) The Plaintiff is one of the 21 major oil producing and refining companies in the United States which control virtually all of the production and refining of gasoline in the United States.

(d) The Act does not constitute a taking of plaintiff's property without compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

(e) The Act does not constitute an unlawful delegation of authority in violation of Article 23 of the

Maryland Declaration of Rights and Article III of the Maryland Constitution.

(f) The Act is not so vague as to deny Plaintiff due process in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

(g) The Act does not discriminate against nor unduly burden interstate commerce so as to be invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

(h) The Act does not conflict with any Federal statute and, therefore, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

7.(a) They deny the allegations contained in the first sentence of paragraph 12 and state that paragraphs (B) and (C) of Chapter 854 prevent a producer or refiner from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged.

(b) They admit the allegations in the second sentence of paragraph 12 of said Bill.

(c) They deny the allegations contained in the third and fourth sentences of paragraph 12. The Legislature, after hearing testimony of the tremendous financial influence and control exercised by the producers and refiners over the operation of retail service stations has deemed that it is in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

8. They deny the allegations contained in paragraph 13 and state that Kayo can lease its service stations with the same type of operation on a profitable basis and

further state that, in fact, other major oil companies at the present time are leasing service stations that employ the same type of operation as Kayo company owned and operated stations.

9. They deny the allegations contained in paragraphs 14 and 15.

10. They deny the allegations contained in paragraph 16 and state that they are advised that there are responsible and experienced independent retail service station dealers who are prepared to operate Kayo outlets on the same concept of operation as that employed by Kayo upon what they believe will be a profitable basis for Kayo and themselves.

11. They admit the allegations contained in the first two sentences of paragraph 17 and deny the allegations contained in the third and fourth sentences of paragraph 17.

12. They admit the first sentence in paragraph 18 and deny the remainder of the paragraph. The Defendants state further that the purpose of Paragraph F of the Act is to insure that all independent retail service station dealers have an equal share of gasoline during periods of shortages.

13. They admit the allegations contained in paragraph 19.

14. They admit the allegations contained in paragraph 20 to the extent that Paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act.

15. They admit the allegations contained in paragraphs 21 and 22.

Further answering:

16. They state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the monopolistic and anticompetitive control by the vertically integrated petroleum producer and refiner in the retail market.

17. They state that the tremendous financial power of the vertically integrated producers and refiners permit them to merge the monopolistic and competitive levels of the petroleum industry and to subject independent retail service station dealers to price squeezes and unfair competitive pressure which they have neither the resources nor capacity to resist.

18. They state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Conoco can maximize the profits earned at the noncompetitive and less competitive levels.

19. They state that price wars and the tremendous financial power of the petroleum producers and refiners such as Conoco have led to economic chaos in the retail service station business and impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

20. They state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Conoco can compete at several levels and compete over a wide range of territory and thus

compensate for losses at a particular level or in a particular area. As a result of the economic hardship from price wars the turnover ratio and failure ratio of retail service station dealers is higher than any other principal business classification. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a level that would otherwise have existed.

21. They state that while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. The producers and refiners such as Conoco have concentrated on developing company owned and operated retail outlets that can pump high gallonage and abandoned low gallonage retail stations to the detriment of the general public in certain geographical areas.

22. They state that in this State the Gasoline Tax Division of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972 through December 31, 1973 and that there were 303 fewer service stations to serve the public at the end of the same period.

23. They state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems, lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July and August 1973. The Gasoline Tax Division found that the retail service stations that were company owned and operated had no difficulty in securing the gasoline they could sell whereas other retail dealers were not supplied with all of the gasoline they could sell.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should not be issued, the Defendants respectfully pray that this action be vacated and that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/Francis B. Burch
Attorney General

/s/Jon F. Oster
Assistant Attorney General

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

No. 22,216

Shell Oil Company,

Plaintiff,

v.

Marvin Mandel, Governor of the State of Maryland, et al.,

Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed September 3, 1974

Shell Oil Company ("Shell") brings this civil action against the above-named defendants and complains and alleges as follows:

I.

Parties

1. Plaintiff Shell Oil Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices at One Shell Plaza, Houston, Texas. Plaintiff is a producer of crude oil and a refiner of petroleum products and operates with company personnel a retail service station in the State of Maryland. Shell owns, has adopted and uses in commerce the federally registered trademark of "Shell." Shell is authorized to do business in the State of Maryland and is a supplier of gasoline and other petroleum products in

Maryland, selling to motorists, other consumers, dealers, wholesalers, and others. All of the gasoline sold by Shell in Maryland is transported into the State in a continuous flow of interstate commerce from refineries located outside the boundaries of the State.

2. Shell sells quantities of gasoline and other petroleum products and other goods and services at retail to motorists and other consumers both in local Maryland markets and to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, who use such petroleum products in interstate or foreign commerce with Maryland.

3. There are approximately 196 independent dealer stations in Maryland buying Shell branded gasoline directly from Shell. In addition, Shell has one (1) company-operated service station. This station required a large initial capital investment in land, building and equipment and this investment must be continuously sustained. In addition to marketing gasoline, this company-operated station sells automobile products, such as tires, batteries and accessories.

4. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State. He is sued herein in his official capacity.

5. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the

sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

II.

Jurisdiction and Venue

7. The jurisdiction of this Court is invoked under the Uniform Declaratory Judgment Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act.

8. Defendants Marvin Mandel and Louis L. Goldstein have their places of business and official residences in Anne Arundel County and, therefore, venue is proper in this Court pursuant to Section 6-201 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition).

III.

Nature of the Controversy

9. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland §157U (1957 Edition, as amended), provides for the regulation of the sale of

petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunctive against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

10. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

11. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland 1974 (the "Act"). A copy of the Act is attached hereto as Exhibit A. The Act became effective July 1, 1974 and amended Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

12. If the Act is not declared unconstitutional, Shell and its officers, agents and employees will be subject to criminal prosecution in Maryland because of its aforementioned operation. Alternatively, Shell will be unable to continue in the business of selling petroleum products at retail in Maryland and it will be required to close or to seek to dispose of or to lease its Maryland facility. In addition, Shell, although having no present intention of converting all or any part of its independent lessee stations to company-operated facilities, does have plans to build large costly innovative units in Maryland which can be effectively operated only as company operated stations. The Act not only will prohibit the evolution of such plans, but, more significantly, it will totally eliminate Shell's retail competition in the Maryland markets and it will be harmful to the interests of both Maryland motorists and petroleum product consumers in interstate or foreign commerce who are required to purchase such products in Maryland. Shell accordingly has an actual and present need for the declaratory and injunctive relief which is sought herein. Shell has no adequate remedy at law.

IV.

Constitutional Defects In the Act

13. In prohibiting producers and refiners from opening and operating after July 1, 1974, and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, the Act requires plaintiff and others similarly situated to divorce themselves from the retail service station business. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or

by restricting free and open competition. There is no basis to support the proposition that the operation of retail service stations by refiners or producers has anticompetitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings. On the contrary, such operations enhance competition and a denial of this right will lessen competition to the detriment of the consumer and contrary to the public policy of both the State of Maryland and the United States. It is only through a network of dealer operated service stations as supplemented by company operated stations that the consumer will receive those benefits which can only result from such complementary systems of distribution.

14. The Act bears no substantial relation to the health, safety, morals or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature. It is an improper and invalid exercise of the police power of the State and denies to Shell due process of Law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

15. The Act goes far beyond what is required in order to meet any possible proper legislative objectives such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers; indeed, its primary purpose is to restrict competition. Existing state and federal law provide for far less restrictive alternatives for achieving any such legitimate objective of this legislation, and this legislation is contrary to the purpose and spirit of other legislation designed to promote competition. The Act is not only unreasonable and unduly oppressive, but it is patently

beyond any legitimate necessities. Thus, the means selected by the Legislature bear no real and substantial relationship to any legitimate object sought to be obtained.

16. The Act discriminates against refiners and producers and prohibits them from engaging in certain lawful business activities, i.e., from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent while other major elements of the petroleum industry, all business entities who sell petroleum products but are not producers or refiners, and all other business entities are not subject to the prohibitions of the Act. The Act thus denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

17. The Act, by regulating certain business and distribution practices of refiners, producers and wholesalers, without regulating the same practices by other persons or business entities, denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

18. The Act contains classifications, applications, and distinctions which are arbitrary, capricious, and without reasonable basis in law or in fact, in that, among other things:

(a) it precludes producers and refiners, and their subsidiaries, from engaging in retail sale of their petroleum products whereas all other persons and business entities may engage in retail sale of their own products;

(b) it allows producers and refiners, and their subsidiaries, to operate their retail service stations under a tertiary brand;

(c) it allows producers and refiners, and their subsidiaries, to sell unlimited amounts of gasoline and petroleum products to retail bulk purchase accounts, such as the State, other governmental units and private business, and thereby does not limit such retail sales to consumers; and

(d) it prohibits independent refiners and producers, among others, from entering into the retail service station market and independent marketers, among others, from entering into production and refining.

The Act denies to plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

19. By prohibiting refiners and producers from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, the Act removes a class of competitor from not only the retail gasoline service station market, but also the increasingly significant automobile service and repair market and the retail market for such products as tires, batteries, and automobile accessories. Further, by removing such producers and refiners from the retail gasoline market and by requiring producers, refiners and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all retail service station dealers across the State, regardless of the relevant trading area, the opportunity for normal and lawful price competition is restricted in fact by the Act, contrary to federal legislation such as Section 2(b) of the Robinson-Patman Act, for the benefit of some dealers.

20. The Act constitutes a taking of part or all of plaintiff's substantial investment in its retail service station business and a part or all of its return on investment without just compensation and for private use in violation of Article 23 of the Maryland Declaration of Rights, Article III, Section 40 of the Maryland Constitution and the Fourteenth Amendment to the United States Constitution.

21. By prohibiting refiners and producers from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, the Act not only establishes an arbitrary divorcement date, but also denies Shell the right to earn a reasonable rate of return on its investment and takes Shell's property without compensation and for private use.

22. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "permit reasonable exceptions to the divestiture dates after considering all of the relevant facts." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Shell from engaging in a lawful business; yet the delegated authority does not extend to a situation such as an independent dealer unexpectantly leaving a station with the result that both the consumer, through inconvenience and disruption of service, and the incoming dealer, through loss of clientele, incur hardship and economic loss due to the temporary but now

necessary closing of the station. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and denies to Shell due process of law in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

23. The Act is so vague and ambiguous that plaintiff cannot determine whether it is subject to violation of the criminal provisions applicable to the Act. Therefore, plaintiff is denied due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

24. Paragraph B of the Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

Paragraph C of the Act provides:

> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

Nowhere within these paragraphs or the Act are the terms "major brand", "secondary brand", "unbranded", "service station", and "subsidiary company" defined.

The ambiguity and vagueness of these terms is demonstrated, *inter alia*, by the question of whether "service station" is limited to those stations which have available vehicular related services, such as repairs and

accessories, or includes those stations which merely provide gasoline facilities or those stations which provide gasoline facilities, but derive the major percentage of their revenue from the sale of groceries or other nonpetroleum related products. In light of the criminal and civil penalties imposed for violations of the Section, and the vague and ambiguous terms identified herein, paragraphs B and C of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

25. Paragraph D of the Act provides:

> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

Paragraph E of the Act provides:

> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

Nowhere within these paragraphs or the Act are the terms "voluntary allowances", "equipment rentals", "uniformly" and "retail service station dealers supplied" defined.

The ambiguity and vagueness of these terms is demonstrated, for example, by the question of whether "equipment rentals" is limited to include hand tools or storage tanks or gasoline pumps or lifts or the entire service station facility; whether "voluntary allowances" encompasses the granting of rent relief to a dealer so that he may avoid the full economic impact of a temporary road closing or a fire which temporarily prevents

acceptance of repair work; whether "uniformly" is to be measured in terms of cents per gallon or a strict monetary basis per item of equipment; whether "uniformly" is used in the context of the various stratas of retail operations, that is in the relationship to the comparison between a sparcely patronized single pump operation and a sophisticated, high volume operation; and in other respects. The ambiguity and vagueness of these terms may produce results that it is unlikely the Legislature wished to produce. In light of the criminal and civil penalties imposed for violations of the Act and the vague and ambiguous terms identified herein, paragraphs D and E of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

26. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

27. Under 10 C.F.R. §212.82(f) and §212.93(a) of the Petroleum Allocation and Price Regulations, the base price for sales for both refiners and resellers "is the weighted average price at which the item was lawfully priced in transactions with the *class of purchaser* concerned on May 15, 1973" (with adjustments not pertinent here) (emphasis added). Sections 212.82(f) and 212.93(d) provide that in computing the base price charged to a "class of purchaser" a refiner or reseller "may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." "Class of Purchaser" is defined in §212.31 to mean:

> purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

"Customary price differential" includes:

> a price distinction based on a discount, *allowance*, add-on, premium, and an extra base on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery. (Emphasis added)

The Regulations thus expressly require refiners and sellers to reflect any allowances in effect on May 15, 1973 in determining the base price charged to their purchasers, and the Regulations expressly sanction price differentials and different allowances based on such differences as volume, location, or type of purchaser. The requirement of Paragraph D of the Act, amending Article 56, §157E, that all voluntary allowances be extended "uniformly", is, therefore, in conflict with and preempted by the Regulations in accordance with section 6(b) of the Emergency Petroleum Allocation Act of 1973 and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

28. Under 10 C.F.R. §210.62 of the Petroleum Allocation and Price Regulations, it is provided that a supplier may not "modify any . . . normal business practice so as to result in circumvention of any provision of this chapter." Compliance with the requirements of paragraph D of the Act would be a deviation from Shell's normal business practices and would have the effect of frustrating or impairing the objectives and the implementation of the Act which provides for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. Therefore, paragraph D is in conflict with and preempted by the Regulations in accordance with section 6(b) of the Emergency Petroleum Allocation Act of 1973 and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

29. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other.

Under 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO, a scheme is established for petroleum

allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation of different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulation. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO.

Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with and preempted by the Regulations in accordance with section 6(b) of the Emergency Petroleum Allocation Act of 1973 and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

30. The requirement of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products "extend all voluntary allowances uniformly to

all retail service station dealers supplied" conflicts with both the spirit and the language of the Robinson-Patman Act, 15 U.S.C. §13, and the Maryland antitrust laws, Article 83, Section 38, Annotated Code of Maryland (1973 Cumulative Supplement). Under both the federal and state antitrust laws, unlawful price discrimination can only result from a price difference which adversely affects competition. Paragraph D of the Act requires all allowances to be made on a state-wide basis regardless of any rationale or justified geographic basis. This provision of the Act is, therefore, in conflict with and preempted by the federal law and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

31. Under the Lanham Act, 15 U.S.C. §1051, Congress fully regulated the registration and use of trademarks in interstate and foreign commerce. It expressed its intention "to protect registered marks used in such commerce for interference by State, or territorial legislation" 15 U.S.C. §1127. Congress also exhausted its constitutional powers in the regulation of trademarks when it defined "commerce" for purposes of the Lanham Act as meaning "all companies which may lawfully be regulated" 15 U.S.C. §1127. Thus, Congress has manifested its intention to use its complete power under the Commerce Clause of the United States Constitution to regulate and protect trademarks and it has expressly prohibited any interference by state action within that field. The Act, which prohibits Shell from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, is preempted by the federal law and is invalid under Article VI, Clause 2 of the Constitution of the United States.

32. The Lanham Act, under 15 U.S.C. §1057, provides the registrant of a trademark with the exclusive

right to use the mark in commerce. The Act deprives Shell of the right to use the "Shell" trademark, which it owns, uses and has adopted, to open and operate after July 1, 1974 and operate after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent. The Act thereby conflicts with the Lanham Act and, therefore, it is invalid under Article VI, Clause 2 of the Constitution of the United States.

33. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article 1, Section 8 of the United States Constitution. The excessive burden and discrimination are demonstrated by, among others, the following examples: the Act prohibits producers and refiners from entering the retail gasoline market in Maryland while at the same time it prevents a retail gasoline company in Maryland from entering into production or refining anywhere; the Act will cause a displacement of market share from Shell and others similarly situated to those companies not prohibited from engaging in the retail service station business; and the Act, by freezing and sterilizing the retail gasoline market, will reduce or eliminate, to the detriment of the consumer, those benefits accorded through a fully competitive market system.

34. The Act places unconstitutional conditions on doing business in the State of Maryland in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

35. In view of the aforementioned allegations, an actual controversy exists between the parties, antagonistic claims are present between the parties and immediate and irreparable injury, loss and damage will result to Shell

unless the defendants are preliminarily enjoined from enforcing the Act until there is a final determination of this lawsuit. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Shell respectfully prays that this Court

(a) Assume jurisdiction over the parties hereto and the subject matter hereof;

(b) Enter a judgment and decree declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid and of no force and effect;

(c) Issue a temporary injunction *pendte lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

(d) Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act; and

(e) Grant such other and further relief as shall be deemed necessary and appropriate.

/s/ William Simon,
/s/ Robert G. Abrams,
Howrey, Simon, Baker & Murchison,
/s/ George W. Shadoan,
Shadoan & Mack,

ANSWER

(To Shell Bill of Complaint)

Filed October 22, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, and John A. Woodstock, Assistant Attorneys General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit the allegations contained in paragraph 1.

2. That they admit that Shell sells gasoline and other petroleum products at the retail level in Maryland, but are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2.

3. That they admit the allegations contained in paragraph 3 but are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the third sentence in paragraph 3.

4. That they admit the allegations contained in paragraphs 4 through 6, inclusive.

5. That they admit this Court has jurisdiction under the Uniform Declaratory Judgment Act as alleged in paragraph 7.

6. That they admit the allegations contained in paragraphs 8 through 11, inclusive.

7. That they admit that if Shell does not comply with the provisions of the Act, Shell will be subject to

criminal prosecution but deny the allegations contained in the second and fourth sentences of paragraph 12. They are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 12. They admit the allegations contained in the fifth sentence of paragraph 12.

8. (a) That they deny the allegations contained in the first sentence of paragraph 13 and state that paragraphs (B) and (C) of Chapter 854 prevent a producer or refiner from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged.

(b) That they deny the allegations contained in the second through fourth sentences of paragraph 13. The Legislature, after hearing testimony of the tremendous financial influence and control exercised by the producers and refiners over the operation of retail service stations has deemed that it is in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

9. That they deny the allegations contained in paragraph 14 of said Bill, specifically answering:

(a) That the Act bears a substantial relation to the economic welfare and continuing existence of the retail service station dealers and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate

objective of the Legislature and a valid exercise of the police power of the State and does not deny to Shell due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

10. That they deny the allegations contained in paragraph 15.

11. That they deny the allegations contained in paragraphs 16, 17 and 18, specifically answering that the Act does not deny plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution because the classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman.

12. That they deny the allegations contained in paragraph 19.

13. That they deny the allegations contained in paragraph 20, specifically answering that the Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

14. That they deny the allegations contained in paragraph 21.

15. That they admit the allegations contained in the first two sentences of paragraph 22 and deny the allegations contained in the third and fourth sentences of paragraph 22.

16. That they deny the allegations contained in paragraph 23, specifically answering that the Act is not so vague as to deny plaintiff due process in violation of

Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

17. That they admit the allegations contained in paragraph 24 as to the provisions of the Act but deny that the Act is so vague as to deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

18. That they admit the allegations contained in the first two sentences of paragraph 25 as to the provisions of the Act. That they admit the allegations of the third sentence of paragraph 25 in that the terms "voluntary allowances", "equipment rentals", "uniformly", and "retail service station dealers supplied" are undefined by the Act, but deny that such terms are unclear as alleged in the fourth, fifth and sixth sentences of paragraph 25 of said Bill.

19. That they admit the allegations contained in paragraph 26.

20. That they admit the allegations contained in the first five sentences of paragraph 27 as to the provisions of the Petroleum Allocation and Price Regulations but deny the allegations contained in the last sentence of paragraph 27 of said Bill because the effect of the federal regulations is to make any allowance extended by Shell to any "class of purchaser" on said date mandatory for the duration of the regulations. Section D of the Act refers solely to voluntary allowances and thus there is no conflict and no preemption under Section 6(b) of the Federal Emergency Petroleum Act.

21. That they deny the allegations contained in paragraph 28 as to any conflict between the Act and

10 C.F.R. §210.62. The complete sentence from which plaintiff has extracted its quotation is as follows:

> "However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (e.g. COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this Chapter."

They also deny that the uniformity requiremnt of paragraph D of the Act in any way conflicts with 10 C.F.R. §210.62 because paragraph (b) of that regulation requires in part that "[n]o supplier shall engage in any form of discrimination among purchasers of any allocated product."

22. That they admit the allegations in paragraph 29 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act.

23. That they deny the allegations in paragraph 30 and say that the precise terms of paragraph D of the Act do not conflict with the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83 §38, Annotated Code of Maryland (1973 Cumulative Supplement) which prohibit anticompetitive pricing and practices. The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

24. That they admit the allegations contained in paragraphs 31 and 32 as to the provisions of the Lanham Act but deny that there is any conflict between the provisions of that Act and the Maryland Act.

25. That they deny the allegations contained in paragraphs 33 and 34.

26. That they admit the allegations contained in paragraph 35 of the Bill.

Further answering:

27. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market.

28. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Shell can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

29. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently companies such as Shell can afford to conduct their retail operation at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

30. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Shell have led to economic chaos in the

retail service station business and impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

31. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Shell can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars the turnover ratio and failure ratio of retail service station dealers is higher than any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a level than would otherwise have existed.

32. That they state that in this State the Gasoline Tax Division of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972 through December 31, 1971 and that there were 303 fewer service stations to serve the public at the end of the same period.

33. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems, lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Comptroller of the Treasury to undertake a study of the retail gasoline situatio.. during June, July and August 1973. The Gasoline Tax Division found that the retail service stations that were company owned and operated had no

difficulty in securing the gasoline they could sell whereas other retail dealers were not supplied with all of the gasoline they could sell. The Gasoline Tax Division also found that certain producers and refiners other than Shell had terminated leases of retail dealers and converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should not be issued, the Defendants respectfully pray that any stipulations entered into by either party pursuant to this action be vacated and that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch,
Attorney General,

/s/ Jon F. Oster,
Assistant Attorney General,

/s/ John A. Woodstock,
Assistant Attorney General,
Attorneys for Defendants.

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AMENDMENT TO ANSWER

(To Shell Bill of Complaint)

Filed October 25, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, and John A. Woodstock, Assistant Attorneys General, amend their Answer to the Bill For Declaratory Judgment and Injunctive Relief previously filed in this Court to state:

1. That they admit the allegations contained in the sixth sentence of paragraph 12.

2. That, for the reasons stated in paragraph 8(b) of their previously filed answer, they also deny the allegations contained in the fifth sentence of paragraph 13 of plaintiff's Bill of Complaint.

3. That they deny the allegations contained in paragraph 20, specifically answering that the Act does not constitute an unlawful taking of property in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

/s/ Francis B. Burch,
Attorney General,

/s/ Jon F. Oster,
Assistant Attorney General.

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

Equity No. 22,461

Gulf Oil Corporation,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed January 23, 1975

Gulf Oil Corporation ("Gulf"), plaintiff herein, by its attorneys, brings this action under the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Gulf declares and alleges as follows:

The Parties

1. Gulf, a Pennsylvania corporation, is a producer and refiner of petroleum products, owns and operates

one retail service station in the State of Maryland, and anticipates owning and operating additional retail service stations in the State of Maryland. Gulf has done business in Maryland for more than thirty years, and believes it is the third leading supplier of gasoline in Maryland, selling to dealers, wholesalers, the public and others approximately nine percent of all the gasoline sold in Maryland. All of the gasoline sold by Gulf in Maryland is transported into the state from refineries located beyond the boundaries of the state.

2. Gulf sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail and wholesale levels both in local markets in Maryland and to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

3. There are approximately 221 independent dealer stations in Maryland buying Gulf branded gasoline directly from Gulf, of which approximately 105 lease stations from Gulf and 116 own their own stations or lease them from parties other than Gulf. The present and anticipated company-operated stations in addition to marketing gasoline, sell and anticipate selling automobile products, such as tires, batteries and accessories, and provide and anticipate providing a complete range of automobile maintenance and repair services, and require and anticipate requiring large initial and sustained capital investment in land, buildings and equipment.

4. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

5. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

7. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> "(b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court

having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require."

8. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

9. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). The Act became effective July 1, 1974 and amended Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant acts and reaching reasonable conclusions based upon those facts.

Constitutional Defects in the Act

10. As more fully set forth below, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. The Act bears no substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature and therefore goes beyond the police power of the State and denies to Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from

engaging in certain lawful business activities, i.e., the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating certain pricing and distribution practices of producers, refiners, and wholesalers, without regulating the same practices by other persons or business entities, denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of plaintiff's substantial investment of its retail service station and a part or all of its return on investment without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of the Treasury by the Act affords no protection to the plaintiff against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that plaintiff can determine whether or not it is subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

i. Paragraphs B and C of the Act conflict with the overriding federal antitrust policy of imposing restraints or divestitute only *after* a judicial showing of a specific violation, and therefore, is preempted by federal antitrust laws under the Supremacy Clause of Article VI of the United States Constitution.

j. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

k. Paragraphs D, E and F of the Act constitute a law impairing the obligation of contracts in violation of Article I, §10 of the United States Constitution.

The Act Denies Plaintiff Due Process of Law and is Discriminatory

11. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974, and in prohibiting producers or refiners from operating retail service stations after July 1, 1975, the Act requires plaintiff and others similarly situated to divorce themselves totally from the retail service station business. Plaintiff has been in the retail service station business in Maryland for over 30 years. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no probative evidence to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings.

12. By prohibiting refiners and producers from operating retail service stations, the Act removes a class of competitor from not only the retail gasoline service station market, but also the increasingly significant automobile service and repair market and the retail market for such products as tires, batteries, and automobile accessories. Further, by removing producers and refiners from the retail gasoline market and by requiring producers, refiners, and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all retail service station dealers across the State, regardless of the relevant trading area, the opportunity for normal and lawful price competition is in fact restricted by the Act for the benefit of some dealers.

13. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Existing state and federal law, including other legislation enacted at the 1974 Session of the General Assembly (see Chapter 852), provide for far less restrictive alternatives for achieving any such legitimate objective. Thus, the means selected by the General Assembly bear no real and substantial relationship to any legitimate object sought to be obtained.

The Act Constitutes an Unconstitutional Taking

14. By prohibiting refiners and producers from operating service stations in the State of Maryland, the Act denies Gulf the right to earn a reasonable rate of return on its investment and takes Gulf's property without compensation and for private use.

15. The Act establishes an arbitrary July 1, 1975 divestiture date, within which one-year period Gulf believes that it will be difficult, if not impossible, to enter into a satisfactory contractual arrangement. Gulf will lose substantial portions of its investment if it is forced to close its company-operated service station before a satisfactory arrangement with a dealer can be worked out.

The Act Constitutes an Unlawful Delegation of Authority

16. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previ-

ously dealer-operated station." Paragraph H of the Act delegates the Comptroller the power to "permit reasonable exceptions to the divestiture dates after considering all of the relevant facts. . . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Gulf from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

The Act is Unconstitutionally Vague

17. Paragraph B of the Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

Paragraph C of the Act provides:

> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

Nowhere within these paragraphs or the Act are the terms "major brand", "secondary brand", "unbranded", "service station", and "subsidiary company" defined.

The ambiguity and vagueness of these terms is demonstrated, *inter alia*, by the question of whether "service station" is limited to those stations which have available vehicular related services, such as repairs and

accessories, or includes those stations which merely provide gasoline facilities or those stations which provide gasoline facilities, but derive the major percentage of their revenue from the sale of groceries or other non-petroleum related products. In light of the criminal and civil penalties imposed for violations of the Section, and the vague and ambiguous terms identified herein, paragraphs B and C of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

18. Paragraph D of the Act provides:

> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

Paragraph E of the Act provides:

> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service stations dealers supplied.

Paragraph F of the Act provides:

> (F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

Nowhere within these paragraphs are the terms "retail service station dealers", "voluntary allowances", "equipment rentals", "uniformly" and "retail service station dealers supplied" defined.

The ambiguity and vagueness of these terms is demonstrated, for example, by the question of whether "equipment rentals" is limited to include hand tools or storage tanks or gasoline pumps or lifts or the entire service station facility; whether "voluntary allowances" encompasses the granting of rent relief to a dealer so that he may avoid the full economic impact of a temporary road closing or a fire which temporarily prevents acceptance of repair work; whether "uniformly" is to be measured in terms of cents per gallon or a strict monetary basis per item of equipment; whether "uniformly" is used in the context of the various stratas of retail operations, that is in the relationship to the comparison between sparcely patronized single pump operation and a sophisticated, high volume operation; and in other respects. The ambiguity and vagueness of these terms may produce results that it is unlikely the Legislature wished to produce. In light of the criminal and civil penalties imposed for violations of the Act and the vague and ambiguous terms identified herein, paragraphs D, E and F of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

The Act is Preempted by the Federal Emergency Petroleum Allocation Act of 1973

18. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Administration, formerly called the Federal Energy Office (the "FEO"), pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

19. Under 10 C.F.R. §212.82(f) and §212.93(a) of the Petroleum Allocation and Price Regulations, the base price for sales for both refiners and resellers "is the weighted average price at which the item was lawfully priced in transactions with the *class of purchaser* concerned on May 15, 1973" (with adjustments not pertinent here). (Emphasis added.) Sections 212.82(f) and 212.93(d) provide that in computing the base price charged to a "class of purchaser" a refiner or reseller "may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." "Class of Purchaser" is defined in §212.31 to mean:

> purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between these purchasers or lessees and other purchasers or lessees.

"Customary price differential" includes:

> a price distinction based on a discount, *allowance*, add-on, premium, and an extra base on a difference in volume, grade, quality, or location or type of

purchaser, or a term or condition of sale or delivery. (Emphasis added.)

The Regulations thus expressly require refiners and sellers to reflect any allowances in effect on May 15, 1973 in determining the base price charged to their purchasers, and the Regulations expressly sanction price differentials and different allowances based on such differences as volume, location, or type of purchaser. The requirement of Paragraph D of the Act, amending Article 56, §157E, that all voluntary allowances be extended "uniformly" is, therefore, in conflict with and preempted by the Regulations in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

20. Under 10 C.F.R. §210.62 a supplier may not "modify any . . . normal business practice so as to result in circumvention of any provision of this chapter." The granting of legally sanctioned price differentials and allowances is a normal business practice. Compliance with Paragraph D's requirement that allowances be extended uniformly would, therefore, be a deviation from a normal business practice and would have the effect of frustrating or impairing the objectives of the Regulations to the extent that the price differentials and allowances are part of the mechanism sanctioned by the Regulations for controlling the price of petroleum products. Therefore, Paragraph D is in conflict with and preempted by the Regulations in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

21. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors,

preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base price and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of

Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with and preempted by the Regulations in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

The Act Conflicts With
Federal Antitrust Laws

22. Paragraphs B and C of the Act, are, in substance, antitrust laws purportedly directed at enhancing competition in the retail sale of petroleum products and the elimination of alleged trade abuses. As such, Paragraphs B and C conflict with the overriding policy in the Sherman Antitrust Act, 15 U.S.C. §§1-7, Clayton Antitrust Act, 15 U.S.C. §§12-27, and Robinson-Patman Act, 15 U.S.C. §13, of imposing restraints or divestiture only *after* a judicial showing of a specific antitrust violation or threatened violation. No such showing has been made, and, therefore, the Act is in conflict with and preempted by the federal antitrust laws.

The Act Conflicts with the
Robinson-Patman Act, 15 U.S.C. §13

23. The requirements of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products "extend all voluntary allowances uniformly to all retail service station dealers supplied" conflicts with both the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) (part of the Maryland antitrust law). Under both the federal and state antitrust laws, unlawful price discrimination can only result from a price difference which adversely

affects competition. Paragraph D of the Act requires all allowances to be made on a state-wide basis without reference to whether there is any adverse effect on competition and regardless of any rationale or justification for the granting of any form of allowance on a more limited geographic basis. Moreover, by creating an artificial state-wide market which totally ignores economic market areas which transcend state lines, Paragraph D of the Act violates the aforementioned laws either by (i) requiring producers, refiners and wholesalers of petroleum products to discriminate among retail service station dealers in the same economic market areas where such areas transcend state lines, or (ii) affecting interstate commerce by the *de facto* imposition upon other states of prices mandated by the Act. Therefore, the Act conflicts with and is preempted by the federal law.

The Act Impairs the Obligation of Contracts

24. The requirements of Paragraphs D, E and F of the Act to extend voluntary allowances uniformly, apply all equipment rentals uniformly, and apportion uniformly gasoline and special fuels during periods of shortages on an equitable basis without discrimination in allotments conflict or may conflict with pre-existing contracts between Gulf and numerous dealers. Therefore, Paragraphs D, E and F constitute a law impairing the obligation of contracts in violation of Article I, Section 10 of the United States Constitution.

25. Gulf has no adequate remedy at law, and will sustain irreparable injury in the absence of relief as herein prayed.

26. In view of the aforementioned allegations, an actual controversy exists between the parties and

antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Gulf respectfully prays that the Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act, and set this case down for prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award plaintiff declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

/s/Donald N. Rothman

/s/Lawrence S. Greenwald

Gordon, Feinblatt, Rothman,
Hoffberger & Hollander
1200 Garrett Building
Baltimore, Maryland 21202
752-4567

Attorneys for Plaintiff

ANSWER

(To Gulf Bill of Complaint)

Filed February 3, 1975

[Caption Omitted in Printing]

The Defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, and John A. Woodstock, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit that Gulf is a Pennsylvania corporation, that it is producer and refiner of petroleum products, and that it owns and operates one retail service station in the State of Maryland, but are without knowledge and information sufficient to form a belief as

to the truth of the remaining allegations contained in paragraph 1.

2. That they admit that Gulf sells gasoline and other petroleum products and other goods and services at the retail and wholesale levels in Maryland, but are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2.

3. That they are without sufficient information and belief as to the truth of the allegations contained in paragraph 3.

4. That they admit the allegations contained in paragraphs 4 through 6, inclusive.

5. That they admit the allegations contained in paragraphs 7 through 9, inclusive.

6. That they deny the allegations contained in paragraph 10, specifically answering:

That the Act bears a substantial relation to the health, safety, morals, and welfare of the people of the State of Maryland. Furthermore, the Act bears a substantial relation to the economic welfare and continuing existence of retail service station dealers in the State of Maryland and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State and does not deny to Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

The Act does not deny Gulf and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. The classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman. The classification of producers, refiners, and wholesalers is a reasonable classification and bears a rational relationship to a legitimate state purpose in regulating gasoline pricing and distribution practices in Maryland.

The Act does not constitute a taking of part or all of Gulf's substantial investment in its retail service station and a part or all of its return on investment without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

The Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

The Act is not so vague and ambiguous as to deny Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The Act is not invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

Defendants admit that paragraph F of the Act may conflict with the Federal Emergency Petroleum Act of 1973 and that it may be invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraphs B and C of the Act do not conflict with federal antitrust policy and, accordingly, are not pre-empted by the federal antitrust laws under the Supremacy Clause of Article VI of the United States Constitution.

Paragraph D of the Act does not conflict with the Robinson-Patman Act, 15 U.S.C. §13, and, accordingly, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraphs D, E, and F of the Act are not in violation of Article I, §10 of the United States Constitution.

7. That they deny the allegations contained in paragraphs 11 through 13, inclusive. They further state that paragraphs B and C of the Act prevent producers or refiners from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged. They further state that the Legislature, after hearing testimony of the tremendous financial influence and control exercised by producers and refiners over the operation of retail service stations, deemed that it was in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

8. That they deny the allegations contained in paragraph 14.

9. That they admit that the Act establishes July 1, 1975 as the "divestiture date", but deny the remaining allegations of paragraph 15.

10. That they admit the allegations contained in the first two sentences of paragraph 16, but deny that the discretion granted to the Comptroller is unlimited and further deny that it constitutes an unlawful delegation of legislative authority and a denial of due process of law. They deny that paragraph H of the Act is void.

11. That they admit the allegations contained in paragraph 17 as to the provisions of the Act, but deny that the Act is so vague as to deny Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

12. That they admit the allegations contained in the first three sentences of the first paragraph 18 as to the provisions of the Act. That they admit the allegations of the fourth sentence of said first paragraph 18 in that the terms "retail service station dealers", "voluntary allowances", "equipment rentals", "uniformly", and "retail service station dealers supplied" are undefined by the Act, but deny that such terms are unclear as alleged in the remaining sentences of said first paragraph 18 of said Bill. They further deny that paragraphs D, E, and F of the Act deny Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

13. That they admit the allegations contained in the second paragraph 18.

14. That they admit the allegations contained in the first five sentences of paragraph 19 as to the provisions of the Petroleum Allocation and Price Regulations but deny the allegations contained in the last sentence of paragraph 19 of said Bill because the effect of the federal regulations is to make any allowance extended by Gulf to any "class of purchaser" on said date mandatory for the duration of the regulations. Section D of the Act refers solely to voluntary allowances and thus there is no conflict and no preemption under Section 6(b) of the Federal Emergency Petroleum Act and Article VI, Clause 2 of the United States Constitution.

15. That they deny the allegations contained in paragraph 20 as to any conflict between the Act and 10 C.F.R. §210.62. The complete sentence from which plaintiff has extracted its quotation is as follows:

> "However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (e.g. COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this Chapter."

They also deny that the uniformity requirement of paragraph D of the Act in any way conflicts with 10 C.F.R. §210.62 because paragraph (b) of that regulation requires in part that "[n] o supplier shall engage in any form of discrimination among purchasers of any allocated product."

16. That they admit the allegations in paragraph 21 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

17. That they deny the allegations contained in paragraph 22 of the Bill.

18. That they deny the allegations in paragraph 23 and say that the precise terms of paragraph D of the Act do not conflict with the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) which prohibit anticompetitive pricing and practices. The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

19. That they are without knowledge and information sufficient to form a beiief as to the truth of the allegations contained in the first sentence of paragraph 24 of the Bill. They deny the allegations contained in the second sentence of said paragraph 24.

20. That they admit the allegation in paragraph 25 that Gulf has no adequate remedy at law but deny that Gulf will sustain irreparable injury in the absence of the relief requested.

21. That they admit the allegations contained in paragraph 26 of the Bill.

Further answering:

22. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market.

23. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Gulf can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

24. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Gulf can afford to conduct

their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

25. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Gulf have led to economic chaos in the retail service station business and have impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

26. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Gulf can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars, the turnover ratio and failure ratio of retail service station dealers is higher than in any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a higher level than would otherwise have existed.

27. That they state that in this State the Gasoline Tax Division of the Office of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972, through December 31, 1973, and that there were 303 fewer service stations to serve the public at the end of the same period.

28. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems and lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Office of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July, and August, 1973. The Gasoline Tax Division found that retail service stations which were company owned and operated had no difficulty in securing gasoline to sell, whereas non-company retail dealers were not supplied with all of the gasoline which they needed to stay open and meet demands. The Gasoline Tax Division also found that certain producers and refiners other than Gulf had terminated leases of retail dealers and had converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why neither a temporary nor a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should be issued, the Defendants respectfully pray that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/Francis B. Burch

Attorney General of Maryland

/s/Jon F. Oster

Deputy Attorney General

/s/John A. Woodstock

Assistant Attorney General
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Attorneys for Defendants

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

Equity No. 22,502

Phillips Petroleum Company,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed February 14, 1975

Phillips Petroleum Company ("Phillips"), Plaintiff herein, by its attorneys, J. Edward Davis and Edward J. Smith, Jr., brings this action under the Uniform

Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the Defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. In support thereof, Plaintiff alleges as follows:

1. Phillips, a Delaware corporation, is a producer and refiner of petroleum products which is duly authorized to do business in the State of Maryland. In the course of its business, Phillips regularly sells gasoline and other petroleum products to jobbers, independent dealers and consumers generally in Maryland. All of the gasoline sold by Phillips in Maryland is transported into Maryland in interstate commerce from refineries located outside of Maryland.

2. There are approximately one hundred twenty one (121) marketing outlets in Maryland for the retail sale of Phillips' brands of gasoline and other petroleum products. Approximately one hundred and eight (108) of these outlets are service stations operated by persons or companies who are not Phillips Company personnel, subsidiaries or commissioned agents, but who buy gasoline and other petroleum products from Phillips for retail sale. The remaining thirteen outlets are service stations operated by salaried personnel of Phillips.

3. Each of the thirteen company-operated service stations of Phillips located within Maryland required a

large initial capital investment by Phillips in land, buildings and equipment, which investments must be continuously sustained.

4. The Defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

5. The Defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against the persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The Defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

7. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the treasury shall find any person. . .willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

8. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months or by both fine and imprisonment.

9. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). A copy of the Act is attached hereto as Plaintiff's *Exhibit No. 1.* The Act became effective July 1, 1974 and amended Article 56, §157E by adding to §157E the following provisions:

> (b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland and operate it with company personnel, a subsidiary company, or a commissioned agent.
>
> (c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand,

secondary brand, or unbranded retail service station in the State of Maryland with company personnel, a subsidiary company, or a commissioned agent.

(d) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(e) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers suplied.

(f) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(g) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(h) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

10. As more fully set forth below in paragraphs 12 through 22, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional.

a. The Act bears no real and substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of

the Legislature and therefore goes beyond the police power of the State and denies to Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from engaging in certain lawful business activities, i.e., the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies Plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating certain pricing and distribution practices of producers, refiners, and wholesalers of petroleum products, without regulating the same practices by other persons or business entities, denies Plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of Plaintiff's substantial investment in retail service stations and a taking of Plaintiff's property without just compensation in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of

the Treasury by the Act affords no protection to Plaintiff against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that Plaintiff can determine whether or not it is subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies Plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is, therefore, invalid under the Supremacy Clause of Article VI of the United States Constitution.

i. Paragraph D of the Act conflicts with 15 U.S. Code, Section 13 (Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

11. As set forth above in paragraph 10, Phillips has an actual and present need for the declaratory and injunctive relief which is sought herein. Phillips has no adequate remedy at law.

12. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974 and, in prohibiting producers or refiners from operating retail service stations after July 1, 1975, the Act requires

Plaintiff and others similarly situated to divorce themselves totally from the operation of retail service stations with their company personnel. The Act deprives Phillips of its property without due process of law and denies to Phillips its rights to do business without undue and unreasonable restrictions and regulation. Phillips has sold its refined petroleum products at retail in Maryland for approximately 12 years. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no basis on which to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings.

13. By prohibiting refiners and producers from operating retail service stations, the Act removes a class of competitor from the retail service station market and thereby effectively precludes such companies not only from selling their refined petroleum products through their stations operated with their salaried employees but also from supplying or furnishing at retail other items of merchandise such as tires, batteries and accessories, and automobile service and repair work. The Act thus denies to the consuming public the opportunity of purchasing these necessary goods and services from producer or refiner-operated service stations.

14. The effect of the Act is to curtail normal competition in the retail service station market. Not only does it eliminate one class of competitor from the marketplace, to the advantage of those remaining in the market who are not subject to the Act, but also, by

requiring producers, refiners and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all service station dealers supplied, the Act interferes with an retards normal, open and otherwise lawful, price competition.

15. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Thus, the means selected by the General Assembly bear no real substantial relationship to any legitimate object sought to be obtained. The Act is thus an improper and invalid exercise of the police power of the State and denies to Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

16. The Act discriminates against refiners and producers and prohibits them from engaging in certain lawful business activities, i.e., from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent while other major elements of the petroleum industry, all business entities who sell petroleum products but are not producers or refiners or subsidiaries or commissioned agents thereof, and all other business entities are not subject to the prohibitions of the Act. The Act thus denies Plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteeneth Amendment to the United States Constitution.

17. The Act establishes an arbitrary July 1, 1975 divestiture date, by which time Plaintiff believes it will not be possible to enter into satisfactory contractual arrangements with suitable dealers. In such event Plaintiff will thus lose substantial portions of its investment in those service stations which under the provisions of the Act, will have to be closed as of that date, unless the Comptroller should in his discretion permit such stations to continue operating.

18. By establishing an arbitrary divestiture date, the Act will require either the closing of the Company operated stations, or their lease or rental to other parties for operation which constitutes a taking of Plaintiff's property without compensation.

19. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "Permit reasonable exceptions to the divestiture dates after considering all of the relevant facts. . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Plaintiff from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

20. Paragraph D of the Act provides that every producer, refiner and wholesaler shall extend all "voluntary allowances uniformly to all retail service station dealers supplied." None of this critical language of the paragraph is defined and it is unclear what is meant by

the terms "voluntary allowances", "uniformly" and "all retail service station dealers". In addition Paragraph F of the Act provides that every producer, refiner and wholesaler shall "apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments." It is unclear what is encompassed by the term "apportion uniformly" and the Act provides no guidance as to the meaning of the term "apportion uniformly". The ambiguity and vagueness of these terms may produce results that it is unlikely that the Legislature wished to produce. The Act is not sufficiently clear and certain so as to inform those subject thereto what conduct may render them liable to penalty. In light of the severe criminal penalties imposed by Article 56, §157F, Annotated Code of Maryland (1975 Cummulative Supplement), which are applicable to the Act amending §157E, and the vagueness of the term referred to, the Act is unconstitutionally vague.

21. (a) Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts. . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Allocation Act also contain a pre-emption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall pre-empt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office (the "FEO") pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a very detailed and comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

(b) Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, [now Federal Energy Administration], shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEA establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logis-

tics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEA Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a State Office of Petroleum Allocation which can operate under authority delegated by the FEA. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency.

(c) The requirement of Paragraph F of the Act amending Article 56, § 157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with the Regulations and is pre-empted by them in accordance with 6(b) of the Emergency Petroleum Allocation Act of 1973. Further, the Emergency Petroleum Allocation Act and the regulations thereunder include pricing in the federal regulatory scheme and therefore, pre-empt the State's attempt in Paragraph B and E of the Act to regulate voluntary allowances and equipment rentals.

22. The requirement of Paragraph D of the Act that all voluntary allowances be extended uniformly to all retail service station dealers supplied would require statewide uniformity without regard to any need or justification for allowances on a more limited basis. The result would be to preclude all allowances, depriving companies subject to the Act of an opportunity to meet competition. This provision conflicts with the Robinson-Patman Act, 15 U.S. Code, Section 13, and is therefore pre-empted.

WHEREFORE, Plaintiff respectfully prays that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award Plaintiff declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the Plaintiff the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the Plaintiff the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

Jerry J. Miller, Esq.
P.O. Box 1751
Amarillo, Texas 79105
806-374-0972
Of Counsel

/s/J. Edward Davis

/s/ Edward J. Smith, Jr.

Weinberg and Green
401 Washington Avenue
Suite 601
Towson, Maryland 21204
539-2125
Attorneys for Plaintiff

[Plaintiffs' Exhibit No. 1, Chapter 854 of the Laws of Maryland of 1974, Omitted in Printing]

ANSWER

(To Phillips Bill of Complaint)

Filed March 5, 1975

[Caption Omitted in Printing]

The Defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, and John A. Woodstock, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit that Phillips is a Delaware corporation, that is a producer and refiner of petroleum products, and that it is duly authorized to do business in the State of Maryland. Defendants are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 1.

2. That they are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. That they are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 3.

4. That they admit the allegations contained in paragraphs 4 through 6, inclusive.

5. That they admit the allegations contained in paragraphs 7 through 9, inclusive.

6. That they deny the allegations contained in paragraph 10, specifically answering:

That the Act bears a real and substantial relation to the health, safety, morals, and welfare of the people of the State of Maryland. Furthermore, the Act bears a real and substantial relation to the economic welfare and continuing existence of retail service station dealers in the State of Maryland and bears a real and substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen, and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State and does not deny to Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

The Act does not deny Phillips and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. The classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman. The classification of producers, refiners, and wholesalers of petroleum products is a reasonable classification and bears a rational relationship to a legitimate state purpose in regulating gasoline pricing and distribution practices in Maryland.

The Act does not constitute a taking of part or all of Phillips' substantial investment in retail service stations and a taking of its property without just compensation

in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

The Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

The Act is not so vague and ambiguous as to deny Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The Act is not invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

Defendants admit that paragraph F of the Act may conflict with the Federal Emergency Petroleum Act of 1973 and that it may be invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraph D of the Act does not conflict with the Robinson-Patman Act, 15 U.S.C. §13, and, accordingly, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

7. That they deny the allegation contained in paragraph 11 that Phillips has an actual and present need for injunctive relief, but admit that Phillips has no adequate remedy at law and that it has an actual and present need for the declaratory relief which it seeks.

8. That they admit the allegation contained in the first sentence of paragraph 12 but deny the allegation contained in the second sentence of said paragraph 12 that the Act deprives Phillips of its property without due process of law and that it denies to Phillips its

rights to do business without undue and unreasonable restrictions and regulation. That they are without sufficient information and knowledge to form a belief as to the truth of the allegations contained in the third sentence of paragraph 12. They they deny the allegations contained in the fourth and fifth sentences of said paragraph 12 and further state that even though the Act does not contain any specific Legislative findings, the Legislature, after hearing testimony of the tremendous financial influence and control exercised by producers and refiners over the operation of retail service stations, did find and determine that it was in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

9. That they admit that the Act prohibits producers and refiners from operating retail service stations and from selling their refined petroleum products through their stations operated with their salaried employees, but deny the remaining allegations contained in the first sentence of paragraph 13. They admit the allegation contained in the second sentence of said paragraph 13.

10. That they deny the allegations contained in paragraph 14.

11. That they deny the allegations contained in paragraph 15.

12. That they admit the allegations contained in paragraph 16 as to the extent that provisions of the Act are noted but deny that the Act is discriminatory. They further deny the allegation contained in paragraph 16 that the Act denies Phillips, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

13. That they admit the allegation contained in paragraph 17 that the Act establishes July 1, 1975 as the "divestiture date", but are without sufficient information and belief as to the truth of the remaining allegations contained in said paragraph 17.

14. That they admit the allegation contained in paragraph 18 that the Act will require either the closing of the company operated stations or their lease or rental to other parties for operation, but deny that this constitutes a taking of Phillips' property without compensation.

15. That they admit the allegations contained in the first two sentences of paragraph 19, but deny that the discretion granted to the Comptroller is unlimited and further deny that it constitutes an unlawful delegation of legislative authority and a denial of due process of law. They deny that paragraphs G and H of the Act are void.

16. That they admit the allegations contained in the first sentence of paragraph 20 as to the provisions of the Act. That they admit the allegations of the second sentence of said paragraph 20 in that the terms "voluntary allowances", "uniformly", and "all retail service station dealers" are undefined by the Act, but deny that such terms are unclear as alleged. They admit the allegations contained in the third and fourth sentences of said paragraph 20 as to the provisions of the Act, but deny that the term "apportion uniformly" is unclear as alleged. They deny the allegations contained in the remaining sentences of said paragraph 20.

17. That they admit the allegations contained in subpart (a) of paragraph 21. That they admit the

allegations contained in subpart (b) of said paragraph 21 as to the provisions of Section 4(b) of the Emergency Petroleum Allocation Act, but deny all allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. That they admit the allegations in subpart (c) of said paragraph 21 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act of 1973. They deny the remaining allegations of said subpart (c) of said paragraph (21).

18. That they deny the allegations in paragraph 22 and say that the precise terms of paragraph D of the Act do not conflict with and are not preempted by 15 U.S.C. §13 (the Robinson-Patman Act). The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

Further answering:

19. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market, and thus seeks to improve the marketplace for the retail distribution of gasoline by making it responsive to normal economic forces.

20. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a

"take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Phillips can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

21. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Phillips can afford to conduct their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

22. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Phillips have led to economic chaos in the retail service station business and have impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

23. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Phillips can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars, the turnover ratio and failure ratio of retail service station dealers is higher than in any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of

price wars can be a reduction in meaningful competition and a general increase in prices to a higher level than would otherwise have existed.

24. That they state that in this State the Gasoline Tax Division of the Office of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972, through December 31, 1973, and that there were 303 fewer service stations to serve the public at the end of the same period.

25. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems and lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Office of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July, and August, 1973. The Gasoline Tax Division found that retail service stations which were company owned and operated had no difficulty in securing gasoline to sell, whereas non-company retail dealers were not supplied with all of the gasoline which they needed to stay open and meet demands. The Gasoline Tax Division also found that certain producers and refiners other than Phillips had terminated leases of retail dealers and had converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why neither a temporary nor a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of

1974 should be issued, the Defendants respectfully pray that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch
Attorney General of Maryland

/s/ Jon F. Oster
Deputy Attorney General

/s/ John A. Woodstock
Assistant Attorney General
One South Calvert Street
14th Floor
Baltimore, Maryland 21202
383-3737

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

In The Circuit Court For Anne Arundel County

Equity No. 22,562

Ashland Oil, Inc.,
Plaintiff,

v.

Marvin Mandel, Governor of the State of Maryland, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed March 26, 1975

Ashland Oil, Inc. ("Ashland"), plaintiff herein, by its attorneys, institutes this action pursuant to the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional. Ashland further seeks to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Ashland declares and alleges as follows:

The Parties

1. Ashland, incorporated under the laws of the State of Kentucky, is a refiner and marketer of petroleum products which owns and operates seventeen service stations in the State of Maryland; Ashland is an independent refiner in that it purchases approximately 85 percent of the crude oil which it refines. These stations employ approximately 140 people all of whom are employees of Ashland and are not lessees of Ashland owned stations. In addition, Ashland sells gasoline to others including wholesalers, who in turn sell gasoline to company-owned stations or independent dealers in Maryland. Ashland, or its subsidiaries, have owned and operated service stations in the State of Maryland since 1961. Ashland has never operated other than company-owned service stations in Maryland.

2. During the twelve months ended September 30, 1974, Ashland's seventeen Maryland service stations had total sales in excess of $12 million consisting almost entirely of gasoline. Ashland service stations do not perform service work or sell tires, batteries or accessories. In total, Ashland believes that it supplies 3 percent of the gasoline sold in Maryland. All of the gasoline sold by Ashland in Maryland is refined beyond the boundaries of that State and transported in interstate commerce to Maryland.

3. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

4. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek

injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

5. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

6. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157F(g), criminal penalties may be imposed for violation of the Subtitle. One who violates any provision of the subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

7. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974, and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"), effective July 1, 1974. Senate Bill 465 as signed into law amended Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

Pursuant to this Act, Ashland has been prohibited from opening new retail service stations in the State of Maryland since July 1, 1974. The Act further will require that Ashland divest its seventeen company owned service stations on or about July 1, 1975.

Constitutional Defects in the Act

8. Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. Inasmuch as paragraphs B and C of the Act prohibit Ashland from engaging in the retail sale of gasoline in the State of Maryland, a lawful and legitimate business enterprise, the Act has no reasonable and substantial relation to the health, safety, morals, or welfare of the people of Maryland. The Act, therefore, exceeds the legitimate exercise of Maryland's police power and denies to Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. Under the provisions of paragraphs B and C of the Act, only refiners and producers of petroleum products are prohibited from engaging in the lawful business activity of the retail sale of gasoline while other significant components of the oil industry, and all other business entities, are not prohibited from retailing

gasoline in Maryland. The Act thus denies Ashland, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Right and the Fourteenth Amendment to the United States Constitution.

c. By prohibiting Ashland from owning and operating retail service stations in Maryland after July 1, 1975, paragraph C of the Act constitutes a taking of part or all of Ashland's investment in retail service stations as well as a part or all of Ashland's return on investment without just compensation and for private use in controvention of Article III §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment of the United States Constitution.

d. By regulating certain pricing and distribution practices of producers, refiners and wholesalers, without regulating the same practices by other persons or business entities, paragraphs D, E, and F of the Act deny Ashland, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

e. The use of the terms "voluntary allowances" and "dealers supplied" in paragraph D of the Act is so vague that there is no rational means for Ashland to ascertain whether or not it is subject to the criminal sanctions imposed by Article 56, §157F, Annotated Code of Maryland (1974 Cumulative Supplement), which are applicable to the Act. Therefore, the Act denies Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

f. Paragraphs D, E, and F of the Act employ the term "uniformly" throughout. Within the context of the Act, these terms are so vague that there is no rational means for Ashland to ascertain whether or not it is subject to the criminal sanctions imposed by Article 56, §157F, Annotated Code of Maryland (1974 Cumulative Supplement), which are applicable to the Act. Therefore, the Act denied Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

h. The Act is devoid of standards for use by the Comptroller of the Treasury in performing his duties thereunder. Accordingly, the Act provides no protection to Ashland against arbitrary, discriminatory or unreasonable exercise of the Comptroller's authority. Paragraphs G and H of the Act therefore constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

i. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

9. Unless enjoined by this Court, defendants will seek to enforce the provisions of the Act against Ashland thereby causing Ashland to suffer immediate and irreparable injury for which Ashland has no adequate remedy at law.

10. In view of the aforementioned allegations, an actual controversy exists between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Ashland respectfully prays that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act, and set this case down from prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award Ashland declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland or their successors from enforcing in any way against Ashland, the provisions of Chapter 854 of the Laws of Maryland of 1974.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against Ashland, the provisions of Chapter 854 of the Laws of Maryland of 1974.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

Semmes, Bowen & Semmes,
/s/ David F. Albright,
and
Ginsburg, Feldman and Bress,
/s/ David Ginsburg,
/s/ Fred W. Drogula,.
/s/ Clark H. Onstad,
Attorneys for Ashland Oil, Inc.

Of Counsel:
Arloe W. Mayne
General Counsel
Ashland Oil, Inc.

ANSWER

(To Ashland Bill of Complaint)

Filed April 8, 1975

[Caption Omitted in Printing]

The Defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, John A. Woodstock and Stephen Cordi, Assistant Attorneys General, in answer to the Bill of Complaint for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That Defendants admit that Ashland is incorporated under the laws of the State of Kentucky and that

it is a refiner and marketer of petroleum products. Defendants are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 1.

2. That Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. That Defendants admit the allegations contained in paragraphs 3, 4 and 5.

4. That Defendants admit the allegations contained in paragraphs 6 and 7.

5. That Defendants deny the allegations contained in paragraph 8 and in each and every subparagraph thereof, specifically answering:

The Act bears a reasonable and substantial relationship to the health, safety, morals, and welfare of the people of the State of Maryland. Furthermore, the Act bears a reasonable and substantial relationship to the economic welfare and continuing existence of retail service station dealers in the State of Maryland and bears a reasonable and substantial relationship to providing a marketplace where retail dealers can compete as independent businessmen in free and open competition with each other. The Act reduces the dominance, direction, and influence of the petroleum producers and refiners in the retail market and thereby restores freedom to the marketplace so that natural market forces can operate in place of the artificial forces which now exist. The Act does not exceed the legitimate exercise of Maryland's police power and does not deny to Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The Act does not deny Ashland and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. The classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate State purpose in preserving the retail service station dealer as an independent businessman and in promoting a marketplace for the retail sale of gasoline where natural market forces can freely operate.

The Act does not constitute a taking of part or all of Ashland's investment in retail service stations as well as a taking of part or all of Ashland's return on investment without just compensation and for private use in contravention of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

The classification of producers, refiners, and wholesalers of petroleum products is a reasonable classification in the law and bears a rational relationship to a legitimate State purpose in regulating gasoline pricing and distribution practices in Maryland. Paragraphs D, E, and F of the Act do not deny Ashland and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The terms "voluntary allowances", "dealers supplied", and "uniformly" as used in the Act are not so vague as to deny Ashland due process of law in violation of Article 23 of the Maryland Declaration of

Rights and the Fourteenth Amendment to the United States Constitution.

Paragraph D of the Act does not conflict with 15 U.S.C. §13 (the Robinson-Patman Act), and, accordingly, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraphs G and H of the Act do not constitute an unlawful delegation of authority to the Comptroller of the Treasury in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

The Act does not discriminate against and does not unduly burden interstate commerce and is not invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

6. That Defendants admit the allegation contained in paragraph 9 that Ashland has no adequate remedy at law but deny that Ashland will suffer immediate and irreparable harm unless Defendants are enjoined by this Court from enforcing the provisions of the Act.

7. That Defendants admit the allegations contained in the first sentence of paragraph 10. They further admit that the controversy can be determined by a declaratory decree setting forth the rights of the parties.

Further answering:

8. That Defendants state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market, and thus seeks to improve the market place for the retail distribution of gasoline by making it responsive to normal economic forces.

9. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

10. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Ashland can afford to conduct their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

11. That they state that price wars and the tremendous financial power of the petroleum producers and refiners have led to economic chaos in the retail service station business and have impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

12. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars, the turnover ratio and failure

ratio of retail service station dealers is higher than in any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a higher level than would otherwise have existed.

13. That they state that in this State the Gasoline Tax Division of the Office of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972, through December 31, 1973, and that there were 303 fewer service stations to serve the public at the end of the same period.

14. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems and lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Office of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July, and August, 1973. The Gasoline Tax Division found that retail service stations which were company owned and operated had no difficulty in securing gasoline to sell, whereas non-company retail dealers were not supplied with all of the gasoline which they needed to stay open and meet demands.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunctive Relief, and having shown cause why neither a temporary nor a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of

Maryland of 1974 should be issued, the Defendants respectfully pray that the Bill of Complaint for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch,
Attorney General of Maryland
/s/ Jon F. Oster,
Deputy Attorney General,
/s/ John A. Woodstock,
Assistant Attorney General,
/s/ Stephen Cordi,
Assistant Attorney General,
Attorneys for Defendants.

[Certificate of Service Omitted in Printing]

In The Circuit Court For Anne Arundel County

Equity Nos. 22,069, 22,091, 22,216, 22,461, 22,502, 22,551, and 22,562

Exxon Corporation, et al.,
Plaintiffs,

v.

Marvin Mandel, Governor, et al.,
Defendants.

ORDER ENTERED AT PRE-TRIAL CONFERENCE

Filed May 5, 1975

Pursuant to the direction of the Court a pre-trial conference was held on May 5, 1975 attended by counsel for the parties and the Court. Pursuant thereto and for good cause appearing it is

ORDERED:

1. Defendants shall not enforce the provisions of Chapter 854 of the Laws of Maryland, 1974, against plaintiffs while the instant case is pending.

2. Plaintiffs shall not, while the instant case is pending open a major brand, secondary brand or unbranded retail service station and operate it with company personnel, personnel of a subsidiary company or a commissioned agent, or convert an existing retail service station in the State of Maryland which is on this date being operated by an independent dealer to

company operation, without, in either event, first notifying the defendants of their intention to do so and the reasons therefor.

3. This Order shall not be deemed to prejudice either plaintiffs' or defendants' right to seek other temporary relief pending a final decision in this case by the Circuit Court for Anne Arundel County.

Entered this 5th day of May, 1975.

E. Mackall Childs,
Judge.

Signatures of Counsel

s/ John A. Woodstock, Esquire,
Assistant Attorney General
Attorney for Defendants.

s/ Lewis A. Noonberg, Esquire,
Piper and Marbury,
Attorneys for Plaintiff
Exxon Corporation,

s/ William Simon, Esquire,
Howrey, Simon, Baker & Murchison,
Attorneys for Plaintiff
Shell Oil Company,

s/ Wilbur D. Preston, Esquire,
Whitford, Taylor, Preston,
Trimble & Johnson,
Attorneys for Plaintiffs
Continental Oil Company, et al.,

s/ Lawrence S. Greenwald, Esquire,
Gordon, Feinblatt, Rothman,
Hoffberger & Hollander,
Attorneys for Plaintiff
Gulf Oil Corporation,

s/ J. Edward Davis, Esquire,
Weinberg and Green,
Attorneys for Plaintiff
Phillips Petroleum Company.

EXXON CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Filed May 29, 1975

[Caption Omitted in Printing]

Plaintiff, Exxon Corporation, ("Exxon") moves pursuant to Maryland Rule 610 for partial summary judgment declaring paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974 ("the Act") invalid. There is no genuine dispute as to any material fact and Exxon is entitled to judgment as a matter of law. In support thereof Exxon respectfully represents:

1. Exxon and the defendants have stipulated to the following facts:

a. "Exxon, incorporated under the laws of the State of New Jersey, is a producer and refiner of petroleum products and owns and operates retail service stations in the State of Maryland. Exxon believes it is the leading supplier of gasoline in Maryland selling to dealers, wholesalers, the public and others approximately 19 percent of all the gasoline sold in Maryland. All of the gasoline sold by Exxon in Maryland is transported into the state from refineries located

beyond the boundaries of the state." (Complaint ¶1, Answer ¶1.)

b. As of July 1, 1974 there were 532 service stations in Maryland receiving their petroleum products directly from Exxon. 36 of these service stations were company operated. The remainder were operated by independent dealers. (Proffer of Evidence ¶16 and see letter of Assistant Attorney General to Judge Evans September 11, 1974).

c. "Exxon recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it does, in order to meet competition from other suppliers, temporarily reduce its wholesale price or grant temporary allowances to its dealers or resellers without making a general price reduction or allowance throughout the State." (Proffer of Evidence ¶26 and see letter of Assistant Attorney General to Judge Evans September 11, 1974).

d. "The sale of gasoline in Maryland and in the United States is currently being regulated by the federal government pursuant to the Emergency Petroleum Allocation Act of 1973 [and the Federal Energy Administration Act of 1974] and the regulations issued thereunder. Exxon has been and continues to operate in full compliance with said Act and regulations." (Proffer of Evidence ¶29 and see letter of Assistant Attorney General to Judge Evans September 11, 1974).

2. Paragraph D of the Act provides:

"Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

3. Paragraph D of the Act is in conflict with Section 2(b) of the Robinson-Patman Act, 15 U.S.C. §13(b) and is, therefore, invalid under Article VI of the United States Constitution (the Supremacy Clause).

4. Paragraph F of the Act provides:

"Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments."

5. Paragraph F of the Act is in conflict with and is preempted by the Federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.* and the Federal Energy Administration Act of 1974, 15 U.S.C. §761 *et seq.* and is, therefore, invalid under Article VI of the United States Constitution (the Supremacy Clause).

/s/ William L. Marbury,
/s/ Lewis A. Noonberg,
/s/ David F. Tufaro,

Piper & Marbury,
Attorneys for Plaintiff,
Exxon Corporation.

Of Counsel:
Richard P. Delaney,
May 29, 1975

[Notice to Defendants and
Certificate of Service Omitted in Printing]

SHELL OIL COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT
Filed May 29, 1975

[Caption Omitted in Printing]

Plaintiff Shell Oil Company ("Shell") moves for partial summary judgment declaring that Paragraphs D and F of Chapter 854 of the Laws of Maryland of 1974 ("Maryland Act") are invalid. Although a favorable ruling with respect to the issues presented in this motion may not dispose of the entire litigation, such a ruling would limit the many issues presently before the Court. More importantly, it would properly direct the focus of the trial to the heart of this litigation, namely the divorcement provisions of Paragraph C of the Maryland Act. In this light and on the basis that (1) there is no genuine dispute as to any material fact relating to the issues raised by Shell's motion and (2) the record establishes, as to the legal question presented, that Paragraphs D and F unconstitutionally conflict with federal law, Shell is entitled to partial summary judgment as a matter of law declaring that

Paragraphs D and F of the Maryland Act are unconstitutional, illegal, invalid and of no force and effect.

This motion is based on the facts, law and reasons stated herein, and in the attached memorandum of points and authorities which is incorporated herein by reference.

/s/ William Simon,
/s/ Robert G. Abrams,
/s/ Michael E. Campbell,
Howrey, Simon, Baker & Murchison,
/s/ George W. Shadoan,
Shadoan & Mack.

Dated: May 29, 1975

AFFIDAVIT OF WALTER D. NAUGHTON
Filed May 29, 1975

[Caption Omitted in Printing]

County of Harris, State of Texas, ss:

WALTER D. NAUGHTON, being duly sworn upon oath, deposes and says:

1. I am the Marketing Manager for the Southeast Area of Shell Oil Company, and, in this position, I am responsible for Shell's retail marketing operations in the State of Maryland. Though approximately 26 years of experience with Shell, largely in marketing, I have developed an extensive background in service station retailing and other aspects of petroleum marketing.

2. Under specified market conditions, Shell grants temporary price reductions, or "competitive allowances", to its branded retail dealers. Shell's purpose in granting competitive allowances is to provide competitive and equitable assistance in gasoline prices to Shell dealers who are injured by local competitive gasoline price reductions of competing retailers which are subsidized by their suppliers.

3. A competitive allowance is intended for use when Shell's branded dealers suffer financial injury, in terms of loss of customers, reduced unit profit, or both, because a supplier in competition with Shell lowers its price to its retail dealers. By meeting its competition through reduced product cost to its dealers, Shell enables those dealers to remain competitive and thus retain the business of their customers.

4. The "trade area" is the basic geographic area for the authorization of competitive allowances.

5. A trade area is a specific geographic area in which an assessment by Shell field personnel and staff analysts indicates that competitive marketing conditions are substantially the same. All service stations within a trade area have exposure to substantially the same customers and therefore the ability to compete with one another on a relatively equal basis. There are one or more, usually several, Shell service stations in each trade area. The areas may be of various sizes with the smaller ones generally in the more densely populated metropolitan districts where the customer potential is concentrated; larger ones are more characteristic of less populous areas or corridors along heavily traveled arterials where commuter or transient travel is heavy over considerable distances.

6. An example of a Shell designated trade area is one located in the northeastern section of Baltimore County. It is a long narrow corridor beginning at the Baltimore Beltway (I-695) and Belair Road (U.S. 1), running in a northerly direction along Belair Road to the Gunpowder Falls. It is bounded on the east and the west by the property adjacent to Belair Road. It contains three Shell branded service stations and sixteen competitive stations. All of the service stations as well as churches, a few small stores and a shopping center are located on Belair Road. To the many residents of this area the service stations in this corridor provide the most convenient location to purchase gasoline. These people commute to their places of employment in downtown Baltimore, the county seat in Towson and the factories of eastern Baltimore County via the Baltimore Beltway and, therefore, do not have convenient access to other service stations.

7. Shell's policy is to grant competitive allowances only when certain marketing conditions exist. First, Shell grants a competitive allowance only if a Shell dealer requests it; Shell never initiates price assistance. Second, the Shell dealer requesting the allowance must be able to demonstrate real business losses from competitors selling at lower prices. *Third, Shell must determine whether it, and not simply its dealers, is meeting competition; it is not sufficient that a Shell dealer is competing with a lower retail price, but that lower price must be supported by that competing dealer's wholesale supplier.*

8. If Shell grants a competitive allowance to a dealer, it is Shell's policy to offer an equal allowance to all Shell dealers in the same trade area. To the extent necessary to avoid competitive injury, allowances in

appropriate competitive amounts are also given to Shell dealers in adjoining trade areas. The amount of such allowances decreases as the distance from the trade area increases.

9. When Shell grants a dealer an allowance it does not, directly or indirectly, secure the dealer's agreement that the allowance will be reflected in a lower retail price. Whether the dealer will account for his lower cost resulting from the allowance by reducing his retail price is a decision solely within the dealer's discretion.

10. In referring to Shell's then existing plan for granting competitive allowances, which was essentially the same as explained in paragraphs two (2) through eight (8) above, the Federal Trade Commission stated:

> That the Commission's statement of Policy [regarding competitive allowances] can be realistically applied to area price differentials in the petroleum industry was impressively demonstrated in recent hearings before a subcommittee of the House Select Committee on Small Business. There, representatives of Shell Oil Company . . . testified that, in view of the Robinson-Patman Act, such "price assistance" as they give dealers is now offered to all their dealers in a competitive retail marketing area. Their testimony as to this practice emphasize essentially the same elements as the Commission's Statement of Policy.

11. As Marketing Manager for Shell's Southeast Area, I have been advised that Sections 2(a) and 2(b) of the Robinson-Patman Act require a limitation of competitive allowances to specifically delineated trading areas which are substantially smaller in geographic scope than the entire State of Maryland.

12. On the average, Shell supplies 411,000 gallons of automotive gasoline per day within the State of Maryland. If Shell were to grant a price allowance of 3¢ for every such gallon, the cost to Shell would be approximately $12,000 per day.

13. Granting the same price allowance to all Shell dealers throughout the State of Maryland rather than confining the grant of allowances to those Shell dealers located in trade areas experiencing competitive conditions which justify such grants would be a deviation from Shell's normal business practices.

/s/ Walter D. Naughton.

(Notarized)

[Certificate of Service Omitted in Printing]

GULF OIL CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
Filed June 19, 1975

[Caption Omitted in Printing]

Gulf Oil Corporation ("Gulf"), plaintiff, by its attorneys, moves pursuant to Maryland Rule 610 for partial summary judgment declaring invalid Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974, codified as Maryland Annotated Code, Article 56, §157E, hereinafter called "the Act", and enjoining the enforcement thereof. The grounds underlying this motion are as follows:

1. Paragraph D of the Act conflicts with Section 2(b) of the Robinson-Patman Act, 15 U.S.C. §13(b).

Therefore, Paragraph D violates the Supremacy Clause (Article VI) of the United States Constitution.

2. Paragraph F of the Act conflicts with the federal Emergency Petroleum Allocation Act, 15 U.S.C. §751, *et seq.*, and regulations promulgated thereunder. Therefore, Paragraph F violates the Supremacy Clause of the United States Constitution and the preemption clause of the Emergency Petroleum Allocation Act, 15 U.S.C. §755(b).

There is no genuine dispute as to any fact material to this motion, and Gulf Oil Corporation is entitled to partial summary judgment as a matter of law. A supporting memorandum and affidavit are attached hereto. Gulf respectfully joins in the motions for partial summary judgment heretofore filed by Shell Oil Corporation and Exxon Corporation, and adopts the reasoning set forth in their supporting memoranda.

/s/ Lawrence S. Greenwald,
/s/ Nancy E. Paige,
Gordon Feinblatt, Rothman,
Hoffberger & Hollander,
Attorneys for Gulf Oil
Corporation, Plaintiff.

[Notice to Defendants Omitted in Printing]

AFFIDAVIT IN SUPPORT OF GULF OIL CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Filed June 19, 1975

[Caption Omitted in Printing]

I, George W. Ruppersberger, am the director of retail marketing of Gulf Oil Company – U.S., a division of Gulf Oil Corporation. I am competent to be a witness, and have personal knowledge of the facts herein stated.

From time to time, Gulf Oil Corporation grants allowances in various forms to retail service station dealers to meet competition from other suppliers of gasoline and other petroleum products, without extending such allowances on a state-wide basis.

/s/ George W. Ruppersberger.

(Notarized)

ANSWER TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF PLAINTIFFS EXXON CORPORATION, SHELL OIL COMPANY AND GULF OIL CORPORATION

Filed July 7, 1975

[Caption Omitted in Printing]

The defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, and John A. Woodstock and Stephen M. Cordi, Assistant Attorneys General, in answer to the Motions

For Partial Summary Judgment filed by Exxon Corporation, Shell Oil Company, and Gulf Oil Corporation, say:

1. There is a genuine dispute between the parties as to facts which are material to plaintiffs' claim that they are entitled to a partial summary judgment declaring that Paragraphs D and F of Chapter 854 of the Laws of Maryland of 1974 are unconstitutional, illegal, invalid, and of no force and effect, as is more fully explained by defendants in their Memorandum In Support Of Their Response And Opposition To Plaintiffs' Motions For Partial Summary Judgment and accompanying affidavit of James M. Patterson which are attached hereto and which are incorporated herein by reference.

2. Defendants deny that Exxon Corporation, Shell Oil Company, and Gulf Oil Corporation are entitled to a partial summary judgment as a matter of law, as is more fully explained in their aforesaid Memorandum and accompanying affidavit.

3. Defendants specifically deny that there is any unconstitutional conflict between paragraphs D and F of Chapter 854 of the Laws of Maryland of 1974 and Section 2(b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13(b). Defendants further deny that there is any unconstitutional conflict between said paragraphs D and F and the federal regulation of the allocation and pricing of petroleum products, conducted pursuant to the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 15 U.S.C. §751, *et seq.*, and the Federal Energy Administration Act of 1974, 88 Stat. 96, 15 U.S.C. §761, *et seq.*

/s/ Francis B. Burch,
Attorney General of Maryland,

/s/ Jon F. Oster,
Deputy Attorney General,

/s/ John A. Woodstock,
Assistant Attorney General,

/s/ Stephen M. Cordi,
Assistant Attorney General,
Attorneys for Defendants.

AFFIDAVIT OF JAMES M. PATTERSON, Ph.D.
Filed July 7, 1975
[Caption Omitted in Printing]

County of Monroe, State of Indiana, ss.

JAMES M. PATTERSON, being duly sworn upon oath, deposes and says:

My name is James M. Patterson. I live at 2431 North Dunn Street in Bloomington, Indiana. I am Professor and Chairman of Marketing in the Graduate School of Business at Indiana University. Since 1969, I have been engaged in research on the marketing of gasoline. In collaboration with Professor Fred Allvine of Georgia Institute of Technology, I have written two books on gasoline marketing: *Competition Ltd.: The Marketing of Gasoline* (Bloomington: Indiana University Press, 1972) and *Highway Robbery: An Analysis of the Gasoline Crisis* (Bloomington: Indiana University Press, 1974). I have a Ph.D. in Managerial Economics and Politics from Cornell University. I have been in the Marketing

Department at Indiana University since 1960. Prior to that I was an Instructor in the School of Management at Northwestern University. I have been a frequent witness before the Congress on gasoline marketing policy and have testified in numerous antitrust cases as an expert witness regarding marketing arrangements and practices. My publications related to competition in the petroleum industry include:

With Fred C. Allvine, *Competition Ltd.: The Marketing of Gasoline*, Indiana University Press: Bloomington, Indiana, 1972.

"Vertical Integration, Product Shortages and the Marketing of Gasoline," in John Wilson (ed.), *Proceedings of the British Columbia Energy Conference*, University of Victoria, Institute for Policy Analysis, 1974.

"Competitive Market Conditions in the Petroleum Industry," U.S. Congress, Senate Committee on Interior and Insular Affairs, *Market Performance and Competition in the Petroleum Industry*, Part 2, 93rd Congress 1st Session, pp. 530-557. [1974].

With Fred C. Allvine, "Shortages and Gasoline Marketing," *Business Horizons*, April 1974, pp. 5-17.

"The Structure, Conduct and Performance of the Petroleum Industry." A statement before the U.S. Senate, Committee on the Judiciary, Sub-committee on Anti-Trust and Monopoly, August 7, 1974.

With Fred C. Allvine, *Highway Robbery: An Analysis of the Gasoline Crisis*, Bloomington, Ind.: Indiana University Press, 1974, 261 pp.

I wish to speak to the reasonableness of section 157 E(c) and section 157 E(d) of Art. 56, Section E of the Annotated Code of Maryland relating to the operation of retail gasoline service stations by producers or refiners and providing for the uniform treatment of retail dealers.

In my research, I have found that several of the marketing practices that have been developed by the vertically integrated major oil companies appear to be designed to frustrate the effectiveness of competition as a regulator of market behavior in this industry.

My research also shows that there is reason to be concerned about the vitality of competition in the marketing of gasoline. Of particular concern is the need to maintain the vitality of intertype competition between the major integrated firms with their fundamentally non-price methods of marketing-gasoline and the cadre of independent private-brand marketers with their price-discount marketing approach. These discounters have traditionally served a competitive function in the gasoline business which is completely disproportionate to the share of market they command. By aggressively discounting gasoline several cents under the normal suggested retail price of the majors, they act as a check on the marketing margins the majors can enforce on the market. Evidence of this role is provided by the excessive margins charged during the 1973-75 shortage, when the independent marketers ceased to function as an effective margin regulator because they were being denied gasoline by their integrated suppliers. This dramatic rise in margins, mind you, was during a period of Federal price controls. Furthermore, once the mandatory allocation program began to redirect the flow of gasoline back to the independent outlets, major

brand margins automatically began to shrink because of revived intertype competition.

My research further shows that the major oil companies have used a variety of unfair techniques to thwart the functioning of intertype competition. During the early 1960's a principal response of the majors was to subsidize regionally focused price wars with profits from other geographic areas or from other functional levels, especially the tax sheltered, cartel-priced, crude oil level.

The mechanism for implementing this strategy of focused price warfare was price protection or price assistance. This technique for focusing the diversified financial power of the major vertically integrated firms in the industry was further refined by a technique called zone pricing. My research showed that the purpose and effect of price protection and zone pricing was to discipline and control selected independent marketers who were aggressively seeking a larger share of the market through price cuts.

In our book *Competition Ltd.:*, which was based on extensive primary and secondary research, Professor Allvine and I concluded that price protection and zone pricing techniques had been a very effective device for curbing intertype competition and thus for subverting the normal forces that regulate the gasoline market. As a consequence, we argued that price assistance and zone pricing and other forms of dealer subsidies should be forbidden as unfair trade practices which tend to lessen competiton.

Maryland's law which seeks to provide for the uniform treatment of retail service station dealers is perfectly consistent with the findings of my research;

namely, that price assistance programs coupled with zone pricing are techniques which are primarily used to discipline independent discount marketers and hence are destructive of intertype competition.

Paragraph (d) which requires the uniform extension of price support to all stations would limit the ability of the vertically integrated firm to focus its superior financial power on the aggressive independent by means of zone pricing techniques. Under this provision, price subsidies would have to be extended throughout the entire market area, not just within narrowly defined trade areas or zones. This would make it impossible to focus the subsidy by confining it to a relatively few stations around the offending independent. This law does not prevent price competition by either the supplier through general dealer tankwagon price reductions or by the dealer himself through margin reduction.

Paragraph (d) merely closes a loophole which would otherwise allow a supplier to offer indirect price subsidies to selected dealers in order to underwrite their price competition with selected aggressive independents.

Paragraph (c) of the Maryland statuate is also consistent with the findings of my most recent research.

In Chapter 4 of *Highway Robbery: An Analysis of the Gasoline Crisis*, Professor Allvine and I documented the factors which made old marketing strategies less suitable for the emerging marketing situation in the gasoline industry. Such factors as the end of the crude-oil tax shelter and profit cache, the end of oil colonialism, the deterioration of international crude profits, the regulation of domestic crude prices. These and many other factors which represent a "decline in

the old order" have resulted in a series of marketing moves by the majors to improve marketing profitability.

Among the documented moves are the following:

1. Direct entry into private-brand discount marketing through the use of "secondary brands."

2. Withdrawal from unprofitable market areas.

3. Accelerated closing of low volume stations.

4. Curbing of price assistance programs and the search for new ways of pricing gasoline to retailers and of influencing retail price competition without price subsidies based on tankwagon prices.

One of the ways that price assistance can be limited where traditional price assistance programs have proved excessively expensive is to move into direct operation through employee operated stations either as a "fighting brand" or with its primary brand. Direct operations gives the integrated supplier even more power to focus its superior diversified financial power than does the traditional price assistance-zone price technique. Consequently, on the basis of my recent research, I would conclude that the regulation of direct operations is also essential if crucial intertype competition is to be maintained as a vital regulator of marketing margins in the gasoline industry. Events since the passage of the Maryland statute bear out this contention.

In sum I find both provisions of the Maryland statute consistent with my understanding of the workings of this industry which has been developed through several years of intense research on the marketing of gasoline. I also find these provisions reasonably designed to preserve and promote intertype competition as the crucial

regulator of marketing margins in this important industry which is so crucial to our economic well being.

/s/ JAMES M. PATTERSON

(Notarized)

AFFIDAVIT OF HAROLD J. SCHULZ
Filed August 11, 1975
[Caption Omitted in Printing]

State of Virginia, County of Richmond, ss:

1. I am the Area Distribution Manager for the Mid-Atlantic Area of Shell Oil Company, and, in this position, I am responsible for the delivery of finished petroleum products in the States of Maryland, Virginia and parts of North Carolina, Pennsylvania and Delaware. I am the administrator of the delivery facilities through which the finished petroleum products are transported. I have been employed in this position since May 15, 1974.

2. Shell neither produces crude oil nor operates any refinery in the State of Maryland, and Shell is not engaged in producing, blending or compounding motor vehicle fuels in the State of Maryland. Shell's operations in Maryland are limited to the distribution and marketing of petroleum products.

3. Gasoline and other refined motor vehicle fuels sold under the Shell brand in the State of Maryland primarily come from Shell's refineries at Deer Park, Texas and Norco, Louisiana. These products are transported by pipeline or tanker to two terminals

which supply customers in Maryland. The terminals are located in Springfield, Virginia and Wagner's Point, Maryland.

4. Prior to distribution from Shell's two terminals, additives are injected into the gasoline and, in those rare instances when the product quality does not meet specifications, some premium gasoline is added.

/s/ HAROLD J. SCHULZ.

(Notarized)

MOTION FOR LEAVE TO APPEAR AND PRESENT MEMORANDA AND ARGUMENT AS AMICI CURIAE

Filed September 9, 1975

[Caption Omitted in Printing]

Day Enterprises, Inc. trading as Day's Crown, Booth's, Inc., Dolan Enterprises, Inc. and PLB Industries, Inc., move for leave to appear and present memoranda and argument as Amici Curiae in connection with the determination of these actions and for reasons state:

1. Day Enterprises, Inc. operates an independent gasoline service station under the name Day's Crown at Route 198 and Brockridge Road, Laurel, Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

2. Booth's, Inc. operates an independent gasoline service station at 500 Frederick Road, Baltimore,

Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

3. Donlan Enterprises, Inc. operates an independent gasoline service station at 4305 Leeds Avenue, Baltimore, Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

4. PLB Industries, Inc., operates an independent gasoline service station at 4501 Falls Road, Baltimore, Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

5. Crown Central Petroleum Corporation is the largest independent gasoline marketer in Maryland and enjoys approximately a 5% share of gallonage sales in that state. It possesses the fifth largest market share in Maryland of all gasoline marketers, including the major oil companies, being surpassed only by Exxon, American Oil, Shell and Gulf.

6. Prior to 1968 Crown Central Petroleum Corporation had itself owned and operated its own service stations in Maryland. Beginning in that year it began to sell its gasoline through independent dealers in multi-pump stations, selling gasoline and motor oil, unaccompanied by auxiliary services. However, Crown continued to attempt to exercise rigorous control over the prices charged by its dealers for gasoline. In consequence in 1973 it was sued in the United States District Court by four such dealers in cases consolidated as Phillips et al. v. Crown Central Petroleum Corporation, Civil No. 73-303, 304, 504, and 506H. On May 20, 1975 the United States District Court for the District of Maryland in a lengthy Opinion[1] found that Crown had violated Section 1 of the Sherman Antitrust

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[1] Attachment A hereto

Act by entering into illegal vertical agreements fixing the retail prices of gasoline in the Baltimore metropolitan area and by conspiring horizontally with competitors including Ashland Oil, Inc., Petroleum Marketing Corporation, Amerada Hess Corporation and Meadville Corporation in the fixing of retail prices of gasoline in the Baltimore metropolitan area.

7. Recently, Crown Central caused all its existing dealer contracts and leases in the State of Virginia to be cancelled and announced its intention to convert existing gasoline stations in the State of Virginia to company owned stations which will enable it to effectively control the retail pricing of Crown gasoline in that state.[2] Movants believe that in the event that the statute precluding company ownership of gasoline stations in Maryland is not upheld Crown will endeavor to restore its control over the pricing of Crown gasoline in Maryland by terminating movants leases and the leases of other Crown dealers in Maryland and converting their stations to company owned and operated stations.

8. Counsel for the movants were counsel for the Plaintiffs in the Phillips litigation in the United States District Court for the District of Maryland and have also been counsel in other anti-trust litigation involving the petroleum industry. Movants believe that they are in a position to usefully supplement the legal arguments to be presented by the Attorney General in support of the validity of the statute under attack by familiarizing the court with the pertinent legal authorities and literature relating to the commercial setting against which the Maryland statute was enacted.

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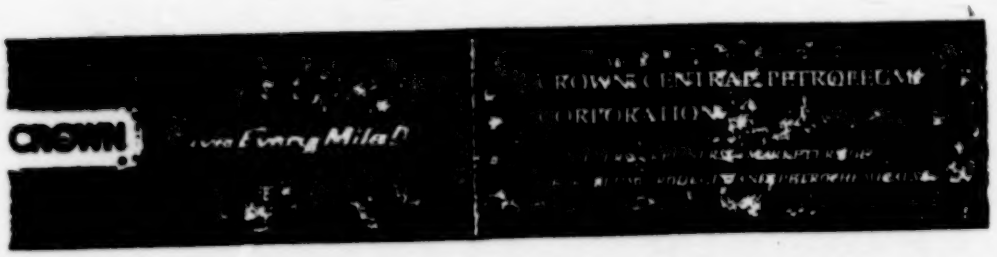
[2] Attachment B hereto

9. Because of the expressed desire of the Court and of all parties for an early determination of the issues in the present proceeding movants do not seek leave to intervene as parties to the action but seek leave only to present briefs and oral argument at any hearing on the constitutional issues involving sub-paragraphs B and C of the Act.

/s/ Robert G. Levy,
/s/ George W. Liebmann,
Frank, Bernstein, Conaway
& Goldman.



INTERIM REPORT

FOR THE SIX MONTHS ENDED JUNE 30, 1975

To the Stockholders:

There is submitted herewith an interim Statement of Consolidated Income of Crown Central Petroleum Corporation and its Subsidiaries for the six months ended June 30, 1975. The comparative figures for the prior year are also shown.

Net income for the first six months of 1975 was $2,057,605 amounting to $1.28 per share on gross revenues of $230,167,466 as compared with a net income of $2,940,765 or $1.83 per share on gross revenues of $188,340,992 for the same period in 1974 after adjusting the amounts originally reported for 1974 to give effect to the LIFO method of determining inventory value.

The increase in gross revenues of approximately 22% reflects primarily the combination of an approximate 35% increase in volume sold and an approximate 7.5% decrease in the average price per gallon received on all sales. The decrease in net income of approximately 30% reflects a combination of the adverse effects of the decrease in the average price per gallon received and the increase in income taxes payable caused by the elimination of the percentage depletion deduction and the favorable effect of several other factors, including a decrease of approximately 1% in the average cost per barrel for crude oil purchased and decreases in unit cost of operation in various areas. While total operating costs have continued to increase, in a number of instances these increases have been at a lesser rate than the increases in volumes over the severely curtailed levels in the first half of 1974. Another favorable factor was the decision to liquidate the Sunset Properties production payment effective May 1, 1975, which increased net profits for the months of May and June by approximately $500,000.

The decrease in the average price per gallon received reflects highly competitive conditions, which have prevailed during the first half of 1975, of an excess of available supplies for many products over effective demand. This competitive condition is continuing. In an effort to recover a part of the decrease which had occurred, the Company in early July increased prices for gasoline throughout its marketing territory. It shortly became apparent that there was insufficient demand at this higher price and the Company has already instituted price reductions in various areas. While there may be further increases in product prices resulting from further increases in costs caused by the imposition of supplemental fees on imported crude oil and from increases in ceiling prices for domestic crude oil, it is now unlikely that these cost increases can be fully reflected in price increases.

Although Crown has been a net seller of entitlements under the Oil Entitlements Program, which was intended to reduce the disparity between the average crude costs of independent refiners and such costs of major competitors, this program has not been effective in the case of Crown, and notwithstanding the above mentioned decrease of about 1%, its average crude cost has continued to be higher than in the case of the major integrated companies with which it competes.

As was reported in April, it was anticipated that the production payment loan on the Sunset Properties, which were acquired several years ago, would be fully liquidated by the end of the third quarter, approximately four years before the originally projected payout. Paying out at this accelerated rate would have required a cash expenditure in excess of $2,200,000 in about five months and after review of this and other cash requirements of the Company, it was decided to borrow $5,000,000 from a group of banks for a two-year period for the purposes of prepaying the remaining balance on the production loan and providing funds for other projects. Capital expenditures. The Company also financed an electrostatic precipitator pollution control for the F.C.C. Unit through tax exempt bonds in the amount

[illegible] ... [illegible] ... [illegible] ... [

PRE-TRIAL ORDER
Filed October 9, 10, 1975
[Caption Omitted in Printing]

Plaintiffs, Exxon Corporation, Continental Oil Company, Kayo Oil Company, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Corporation, Petroleum Marketing Corporation, Commonwealth Oil Refining Company, Inc., and Ashland Oil, Inc., by their attorneys, and defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, respectfully submit the following Pre-Trial Order for court approval.

I. *History of the Litigation.*

1. This litigation was commenced when Exxon Corporation ("Exxon") filed suit against defendants on June 17, 1974 alleging the unconstitutionality of Chapter 854 of the Laws of Maryland of 1974. Plaintiffs Continental Oil Company and Kayo Oil Company ("Kayo") and Shell Oil Company ("Shell") subsequently filed similar suits on June 28th and September 3rd, 1974, respectively. Plaintiffs Gulf Oil Corporation ("Gulf"), Phillips Petroleum Company ("Phillips"), Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc. ("Petroleum Marketing") and Ashland Oil, Inc. ("Ashland") filed bills of complaint on January 23, 1975, February 14, 1975, March 19, 1975 and March 26, 1975,

respectively. All of these suits are consolidated for purposes of the trial of this case.

2. On May 5, 1975 (on July 24, 1975 for Petroleum Marketing), the Court entered an order prohibiting defendants from enforcing against plaintiffs the provisions of Chapter 854 while the instant case is pending and at the same time prohibiting plaintiffs, while the instant case is pending, from opening and operating service stations with company personnel, personnel of a subsidiary company or a commissioned agent without first notifying the defendants of their intention to do so.

3. Motions for partial summary judgment with respect to paragraphs D and F of Chapter 854 were filed by Shell and Exxon on May 29, 1975 and by Gulf on June 19, 1975. A hearing on these motions has been set for August 22, 1975. As a result of the deposition of John K. Coleman, Chief of the Gasoline Tax Division of the Comptroller's office, taken by plaintiffs on July 23, 1975, plaintiffs Continental, Shell, Gulf, Phillips and Ashland filed a joint motion for partial summary judgment as to paragraphs B and C of the statute on August 10, 1975.

4. Discovery has actively proceeded and is complete.

5. Plaintiffs seek a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (as amended at the 1975 Session of the General Assembly by Chapter 608 of the Laws of Maryland of 1975 effective July 1, 1975) ("the Act"), is unconstitutional and invalid, and a permanent injunction prohibiting the defendants from enforcing the provisions of the Act against the plaintiffs. All

plaintiffs, except Exxon and Petroleum Marketing, (by their joint motion for partial summary judgment filed on August 10, 1975) seek a declaratory judgment that paragraphs B and C of the Act are not applicable to them or in the alternative are unconstitutionally vague.

6. The Maryland Act adds the following provisions to Article 56, §157E (the italic portions are those added by Chapter 608):

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.
>
> (G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.
>
> (H) The Comptroller may permit reasonable exception to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

II. *Jurisdictional Matters*

7. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland.

8. The defendant, [illegible]is B. Burch, Attorney General of the State of [illegible]nd, is authorized to seek injunctions against perso[illegible] who [illegible]late Article 56 of the Annotated Code of Maryland.

9. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged

with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations.

10. Plaintiffs have no adequate remedy at law.

11. An actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and any other relief deemed proper by the Court.

III. *Definitions*

12. The following definitions are accepted for purposes of construing Chapter 854 of the Laws of Maryland 1974 in connection with this litigation only.

a. Retail service station dealer is defined in §157A of Article 56 and means any person, firm or corporation maintaining a place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles.[1]

b. Motor vehicle is defined in §135 of Article 56 and means all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors, upon the public highways, and in the case of vehicles propelled by Diesel fuel or fuel

[1] Petroleum Marketing and Continental (Kayo) do not accept this definition.

oil, shall mean all such vehicles licensed to operate upon the public highways.

IV. *Stipulation of General Facts*

A. Legislative History of Chapter 854

13. By letter dated June 13, 1973, Governor Marvin Mandel formally requested Louis L. Goldstein, Comptroller of the Treasury, to conduct a study of gasoline retailing in Maryland to determine whether the shortage was real or contrived and to determine whether company-operated stations received more favorable allocations of gasoline than did independent dealers.

14. Pursuant to the Governor's request, a survey questionnaire requesting information on price changes, supply and allocation quotas, hours of operations, "voluntary allowances" and other types of "dealer aid" and sales limitations to customers, was prepared by the Gasoline Tax Division of the Comptroller's Office under the direction of Arthur E. Price, Chief Motor Fuel Inspector, and mailed on June 29, 1973, to 4,055 gasoline service station dealers within the State of Maryland.

15. 1,407 questionnaire returns, completed in whole or in part, or 34.7 percent of the 4,055 service station dealers sent questionnaires, were received by the Gasoline Tax Division. Based on comments received in those questionnaires, followup investigations were conducted involving approximately 100 dealers. The responses were tabulated on work sheets and a summary table entitled "Recap by Brand" was prepared. From the Recap and Work sheets, a written analysis of the survey results entitled "Results and

Analysis of Service Station Dealers Questionnaire" was prepared by Arthur Price. This analysis was submitted to Governor Mandel for his consideration on September 6, 1973.

16. Pursuant to the Governor's request of June 13, 1973, the Gasoline Tax Division of the Comptroller's Office prepared and mailed on July 17, 1973 a questionnaire to twenty oil companies in order to evaluate further the aforementioned request of Governor Mandel. This questionnaire requested information on company activity within the State of Maryland in the areas of: retail service station operations; new and planned service station construction; past and projected sales volumes; allocation formulas; closing of various types of stations; cancellation and/or nonrenewals of contracts; price increases to customers; elimination of voluntary allowances, rental abatements or other "dealer aid;" company policy regarding hours of operation of its branded service stations; and acquisition of new toll-road accounts for the period of June 30, 1972 through June 30, 1973.

17. Eleven oil companies responded, in whole or in part, to the oil company questionnaire. A written analysis of the survey results entitled "Analysis of Major Oil Compan[redacted]Questionnaires," was prepared by Arthur Price and John K. Coleman. This analysis was submitted to Governor Mandel for his consideration on September 28, 1973.

18. A written report entitled "Analysis of Comparative Report of Taxable and Exempt Gasoline Sales for the Calendar Year 1971, 1972, and the First Six Months of 1973" was submitted to the Governor by the Comptroller on September 6, 1973. This analysis

was prepared from the computer data collected by the Gasoline Tax Division.

19. At the instruction of the Comptroller, John K. Coleman, Chief, Gasoline Tax Division of the Comptroller's Office, drafted a bill purportedly to correct certain alleged inequities said to be based on the returns of the survey questionnaire sent to the retail service station dealers. The returns purportedly formed the basis for the report entitled "Results and Analysis of Service Station Dealers Questionnaire" which had been submitted to the Comptroller and sent to the Governor on September 6, 1973. A draft of the bill was sent to the Governor by Comptroller Goldstein on September 13, 1973.

20. After several discussions with the Governor and his staff, Comptroller Goldstein, by letter dated January 7, 1974, forwarded proposed legislation to the Governor's Office prohibiting producers, refiners, and wholesalers of petroleum products from operating retail service stations, requiring all such persons to extend all voluntary allowances and equipment rentals uniformly to all dealers throughout the State, and requiring that gasoline be apportioned uniformly to all dealers throughout the State.

21. Identical bills (House Bill 918, by Delegate Bonvegna and Senate Bill 465, by Senator Pine) were introduced in the two houses of the General Assembly during the 1974 session. These bills were the same as the draft bill prepared by John Coleman. Both the House and Senate bills were amended to limit the prohibition on the operation of retail service stations to producers and refiners, by deleting the term "wholesaler." In addition, paragraph G was added to both versions of the bill permitting the Comptroller to adopt

rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer operated station. In addition, paragraph H was added to Senate Bill 465 permitting the Comptroller to grant exceptions to the divestiture dates specified by the statute.

22. Public hearings were held by both the Senate and House committees considering these respective bills. At the public hearing on S.B. 465 before the Senate Committee on Economic Affairs held on February 20, 1974, a total of 16 witnesses registered to appear and testify on the bill. Eight (8) opponents represented the following companies or associations: Exxon Corporation, BP Oil Corporation, Shell Oil Company, Southern Maryland Oil Co., Wise Petroleum Co., Blue Ridge Oil, Maryland Petroleum Association and Maryland Oil Jobbers Council. And a total of eight (8) witnesses appeared and/or registered to testify as proponents of the bill, including the Honorable Louis L. Goldstein, Comptroller, who testified and submitted copies of his Office's aforementioned reports to the Governor and to the Economic Affairs Committee for their review and consideration. At the public hearings on H.B. 918 before the House Economic Matters Committee held on March 7, 1974 a total of seven (7) witnesses registered to appear and testify on that bill.

23. Both bills were passed during the 1974 Session of the General Assembly, and Senate Bill 465 which eventually was to be signed into law was passed by a vote of 26-0 (17 absent – no votes), and in the House by a vote of 90-15 (37 absent no votes).

24. Prior to signing the bill into law, the Governor held a special veto hearing on S.B. 465 and H.B. 918 at which time he invited and received for consideration

the views of both proponents, as well as opponents of the legislation. At this special hearing before the Governor, which was held on May 29, 1974, a total of fifteen (15) witnesses appeared to testify on S.B. 465, of which number, seven (7) witnesses registered to appear and testify as opponents of the bill, representing five (5) oil companies, and the business community. Eight (8) witnesses registered to appear and testify as proponents of said bill. Senate Bill 465 was signed into law by Governor Mandel on May 31, 1974 and became Chapter 854 of the Laws of Maryland of 1974.

25. Chapter 854 of the Laws of Maryland was amended during the 1975 Session of the Maryland General Assembly by Senate Bill 797 which was enacted into law as Chapter 608 of the Laws of Maryland of 1975, adding to paragraphs B and C of the statute a further prohibition on operation of service stations by a producer or refiner under a contract with any person for management of a service station on a fee arrangement. The amendment requires that service stations be operated by a retail service station dealer.

B. Retail Marketing in Maryland

26. The consumer in Maryland is served by various kinds of gasoline service stations or outlets in terms of the products and services offered. They include major service centers, combination service station-car wash facilities, turnpike stations, truck stops, conventional service stations, limited service operations offering gasoline but no other driveway services, and full and partial self-service stations.

27. Retail stations are operated under various formats. There is the direct retailing of gasoline by the supplier, which the law being challenged in this suit

would prohibit insofar as that supplier is a producer or refiner of petroleum products. Such direct retailing occurs through operation of the supplier's facility by the supplier's employees, or by employees of a subsidiary company or division. The other major category of retail marketing is performed by independent dealers who operate service stations and resell gasoline sold to them by a supplier. Some individual dealers own their own service stations or lease them from a non-supplier and have a supply contract with a branded or unbranded supplier; others lease a station from a supplier who also supplies them with product.

28. According to the records of the Gasoline Tax Division of the Comptroller's Office, there were approximately 3,995 retail stations in the State of Maryland on December 31, 1972, 3,798 retail stations on December 31, 1973, and 3,757 retail stations on July 1, 1974.

29. The following tables contain an enumeration of the number of retail gasoline stations in the State of Maryland as of July 1, 1974 classified according to supplier of the gasoline, brand name of the gasoline sold, and type of operation (i.e., company operated or dealer operated):

Table A

RETAIL GASOLINE STATIONS IN MARYLAND
OPERATED BY PRODUCERS OR REFINERS*
July 1, 1974

Company	Number of Company Operated Stations
Amerada Hess Corporation	3
Amoco Oil Company	1
Ashland Oil, Inc.	19
Atlantic Richfield Company	6
BP Oil, Inc.	42
Chevron Oil Company (Standard Oil Co. of Calif.)	0
Cities Service Oil Company	2
Kayo Oil Company (Continental Oil Co.)	16
Crown Central Petroleum Corporation	2
Exxon Corporation	36
Getty Oil Company, Eastern Operations, Inc.	0
Gulf Oil Corporation	1
Mobile Oil Corporation	2
Phillips Petroleum Company	13
Petroleum Marketing Corporation (Commonwealth Oil Refining Co.)	21
Shell Oil Company	1
Southern States Cooperative, Inc.	14
Sun Oil Company of Pennsylvania	0
Texaco Oil Company	0
Texaco, Incorporated	0
Union Oil Company of California	0
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* For purposes of this table, the term "producer" is defined to mean a person, firm or corporation engaged in obtaining crude oil and "refiner" is defined to mean one engaged in refining crude oil into motor vehicle fuels, or a subsidiary of a "producer" or "refiner".

Table B

RETAIL GASOLINE STATIONS IN MARYLAND
BY BRAND NAME
July 1, 1974

Brand Name	Company-Affiliation	Company-Operated	Non-Company-Operated	Total
Alert	*Exxon	4	0	4
Amoco	*Amoco	1	618	619
Arco	*Atlantic Richfield	6	217	223
Bi-Lo	*Ashland	2	0	2
BP Gas and Go	*BP Oil	42	6	48
Checker	*United Refining	14	13	27
Chevron	*Chevron	0	51	51
Citgo	*Cities Service	2	263	265
Crown	*Crown Central	2	35	37
Exxon	*Exxon	32	596	628
Fisca	Fisca Oil Co.	5	0	5
Giant Food	Giant Food	2	0	2
Getty	*Getty	0	120	120
Gulf	*Gulf	1	218	219
Hess	*Amerada Hess	3	24	27
Hi-Pi	*Ashland	3	0	3
Hi-Way	Hi-Way Oil, Inc.	5	0	5
Homoco	Homes Oil Co.	7	4	11
Hudson	Hudson	2	0	2
Kayo	*Kayo	16	0	16
Midway	Midway Petroleum	5	5	10
Mobil	*Mobil	2	181	183
National	National Oil	0	9	9
Pantry Pride	Pantry Pride	1	0	1

*Indicates a "producer" or "refiner" as defined in Table A.

Brand Name	Company-Affiliation	Company-Operated	Non-Company-Operated	Total
Payless	*Ashland	2	0	2
Phillips 66	*Phillips	10	108	128
Red Head	*Ashland	12	0	12
Saveway Marit	*Meadville	12	0	12
Savon	Savon Gas Stations	6	0	6
Scot	*Petroleum Marketing	21	0	21
Sears	Sears Roebuck	3	0	3
Shell	*Shell	1	283	284
Southern States Cooperative	*Southern States Cooperative	14	0	14
Sunoco	*Sun Oil	0	225	225
Tenneco	*Tenneco	0		
Texaco	*Texaco	0	307	307
Union 76	*Union Oil	0	152	152
Wards	*Montgomery Ward	4	0	4
Way-Lo	*Phillips	3	0	3
William Penn	*BP Oil	0	112	112
		233	3547	3780

There are these additional brands of gasoline sold in the State of Maryland for which there are no figures available as to the number of stations: Ex-Val, Gas for Less, Penney, Pennzoil, Press, Quaker, Thornton, Thrifty, and Triangle.

According to the records of the Gasoline Tax Division of the Comptroller's Office, there were a total of 3,757 retail gasoline service station dealers in the State of Maryland as of July 1, 1974.

30. The following table shows the percentage of taxable sales of motor vehicle fuel sold within the State of Maryland by company for the period 1969 through August, 1975 based on taxable motor vehicle fuel sales as reported to and taken from the records of the Gasoline Tax Division of the Comptroller's Office. Taxable sales include transactions other than ultimate retail sales to the consumer, and therefore do not necessarily reflect actual percentages of retail sales to the consuming public.

Table C

Percentage of Taxable Motor Vehicle Fuel Sales
in Maryland by Oil Company

1969 - August 1975

Oil Company	1969	1970	1971	1972	1973	1974	1975
Agway	0.0029	0.0040	0.0044	0.0031	0.0037	0.0055	0.0072
Amoco	10.7945	10.6553	10.7350	10.4902	10.2553	10.1315	10.1564
Arco	3.6311	3.5996	3.8684	3.4544	3.7275	3.5542	3.5587
Ashland	2.2588	2.4660	3.2261	3.6271	2.6757	2.7968	3.1549
BP	5.6032	7.9692	7.3590	7.1582	6.1087	5.0831	5.9871
Chevron	0.2795	0.2522	0.2499	0.2616	0.3374	0.3695	0.4344
Citgo	4.2957	4.4425	4.2844	3.8818	3.8125	4.5257	4.2991
Coastal States	0.0000	0.0000	0.2356	0.1593	0.1429	0.1140	0.1077
Continental	0.9439	2.6515	1.8894	1.1948	1.2291	1.1292	0.8567
Crown	2.2357	2.6290	3.1069	3.8731	4.9419	6.2600	6.4427
Exxon	20.0125	19.5171	18.4651	17.5610	19.4841	18.9519	19.4489
Getty	0.7924	0.7916	0.9466	0.9878	0.9332	0.9057	0.7661
Gulf	8.9188	7.7582	7.0727	7.6306	7.8683	8.6302	8.0601
Hess	2.7360	3.0456	3.3963	3.5684	3.9327	3.5405	3.2640
Louisville Ref.	0.3750	0.3633	0.2669	0.1917	0.1863	0.0906	0.1362
Mobil	3.3885	3.3197	3.4995	3.5516	3.5432	3.5488	3.2130
Pet. Marketing	1.1628	0.1533	1.6170	2.8065	2.2136	1.5832	1.5987
Phillips	1.7671	1.7457	1.9211	2.0496	1.7393	1.8675	2.0698
Shell	9.5043	9.5510	9.1651	8.9378	8.9837	8.8347	8.3825
Sinclair	2.4308	0.1030	0.1346	0.0000	0.0000	0.0000	0.0000
Southern States Coop.	1.1610	1.1412	1.1346	1.1469	1.1640	1.0027	1.2459
Sunoco	5.7773	5.6522	5.9209	5.9259	5.6769	5.8645	5.3563
Tenneco	0.9906	1.3338	1.0105	0.8969	0.6635	0.8570	0.7362
Texaco	7.0584	7.9874	7.9028	8.1416	7.6746	7.5190	7.4773
Union	1.1160	1.2356	1.0462	0.7427	0.7623	0.8812	1.0279
Multiple Source	2.7630	1.6319	1.6755	1.7574	1.9397	1.9569	2.2124
	100.00 %	100.00 %	100.00 %	100.00 %	100.00 %	100.00 %	100.00 %

V. *Stipulation of Facts pertaining to Individual Plaintiffs to which the Defendants Have Stipulated*

Appendix A – Exxon

Appendix B – Kayo

Appendix C – Shell

Appendix D – Gulf

Appendix E – Phillips

Appendix F – Petroleum Marketing

Appendix G – Ashland

* * * * * *

Entered this 9th day of October, 1975.

E. Mackall Childs,
Judge.

(Signatures of Counsel)

APPENDIX A
Stipulation of Facts Pertaining to Exxon

1. Exxon Company, U.S.A., a division of Exxon Corporation hereinafter referred to as "Exxon") was formed effective January 1, 1973, and operates the business interests formerly operated by Humble Oil & Refining Company.

2. Exxon is a company involved in exploration for and production of crude oil and natural gas and in the refining, transporting and marketing, at both the

wholesale and retail levels, of a wide range of petroleum products.

3. Insofar as petroleum products are concerned, operations by Exxon in Maryland are limited to distribution and marketing.

4. Exxon has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Exxon branded gasoline in the State of Maryland have all of their gasoline supplied from outside the state.

5. Gasoline sold under the Exxon brand in the state of Maryland normally comes from Exxon's refineries at Baytown, Texas, and Baton Rouge, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Crude oil refined at Baytown normally comes from Texas, Alabama, Florida, and foreign sources. Crude oil refined at Baton Rouge normally comes from Texas, Louisiana, Mississippi, Alabama, Florida and foreign sources.

6. Gasoline produced at these two refineries is transported to two primary terminals which supply customers in Maryland. These primary terminals are located in Fairfax, Virginia and Baltimore, Maryland. The gasoline is normally brought to the Fairfax terminal by common carrier pipeline, the Plantation Pipeline System, from the Baton Rouge refinery. In 1973, approximately 118,500,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal also supplies gasoline to customers in Virginia and Washington, D.C. The Baltimore terminal is normally supplied from the Baytown refinery by tanker. In 1973 approximately 210,000,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal

also supplies gasoline to customers in Pennsylvania, Virginia and West Virginia.

7. Exxon maintains one secondary terminal in Maryland, at Salisbury. The secondary terminals at Easton and Hagerstown have been closed since Exxon filed its Bill of Complaint. The Salisbury terminal is supplied by barge or tank truck from the Baltimore terminal. In addition, a terminal at Norfolk, Virginia has on occasion supplied Exxon brand gasoline for portions of the lower Chesapeake Bay area of Maryland. The Easton, Hagerstown, Salisbury, and Norfolk terminals accounted for approximately 29,000,000 additional gallons of gasoline to Maryland customers in 1973.

8. The majority of Exxon brand motor oil sold in Maryland comes from the Baytown and Baton Rouge refineries where the base stock is made. It is shipped by tanker to Bayonne, New Jersey, where it is blended into motor oil with additives, which are made at Bayonne. It is then barged to the Baltimore plant where it is canned and trucked to customers. The vast majority of greases sold in Maryland at Exxon company-operated stores and at various Exxon dealer service stations come from Exxon's plant in Pittsburgh, Pennsylvania.

9. Antifreeze, spark plugs, tires, batteries and accessories sold at company-operated stations and at various Exxon dealer stations in Maryland are manufactured by other companies at various places outside the State of Maryland and shipped into Maryland by truck and rail.

10. Exxon operates four stations in Maryland selling gasoline under the Alert brand. These stations are

supplied by refineries, other than those of Exxon, located outside the State of Maryland. Prior to June 4, 1974 the product was acquired primarily from Crown Central Petroleum Corporation. Since then, the Alert stations have been primarily supplied by BP Oil Corporation.

11. Exxon does not engage in any producing of motor vehicle fuels in the State of Maryland.

12. As of December 31, 1973 Exxon branded gasoline was sold at approximately 25,400 retail outlets located in forty-five states and the District of Columbia.

13. Exxon began marketing operations in Maryland in 1916. Exxon sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail level both in local markets in Maryland and also to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

14. As of July 1, 1974, Exxon had 36 company-operated stations in Maryland, representing approximately 6.7% of the 532 direct served[1] Exxon branded service stations in Maryland. This represents a decline from 57 company-operated stations in Maryland as of December 31, 1971 or approximately 9.2% of the 620 service stations at that time.[2]

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[1]Those service stations operated by independent dealers or by company personnel which receive their product directly from Exxon, as distinguished from those stations which are supplied by companies which purchased Exxon brand gasoline and resold it. The latter companies are generally known as resellers.

[2]Exxon has traditionally marketed its gasoline primarily through independent retailers and wholesalers rather than

[footnote continued]

15. As of December 31, 1973, Exxon had 356 stations operated by lessee dealers in Maryland. As of December 31, 1974, Exxon had 326 stations operated by lessee dealers in Maryland.

16. At the end of 1973, Exxon had approximately 140 contract dealers in Maryland. At the end of 1974, Exxon had approximately 133 contract dealers in Maryland.

17. Exxon currently has 30 branded resellers in Maryland. Exxon has no direct knowledge of the exact number of Exxon branded outlets through which the resellers sell their products or to the extent to which other products and services are offered by those facilities.

18. Exxon markets its products nationally and in Maryland through the full range of retail facilities described in paragraph 26 of this Pre-Trial Order. In Maryland, Exxon had 11 Car Care Centers (one of which is combined with a car wash facility), one full self-service station, one turnpike station, and four limited service stations selling gasoline under the Alert brand. The remainder of the 532 direct served Exxon branded service stations in Maryland as of December 31, 1973 are conventional facilities.[3]

19. The Car Care Centers in Maryland have from 7 to 12 bays as compared with 2 to 4 bays of the typical

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through company operations. As of December 31, 1973, Exxon operated with company personnel 933 service stations nationwide. These stations represent approximately 3.7% of the approximately 25,400 Exxon retail outlets.

[3]As of July 1, 1974, Exxon had 123 major service centers nationwide which operate under the logo Exxon Car Care Center and had 74 full self-service stations nationwide.

conventional service station and the cost of investment is substantially higher. They are specifically equipped and manned for repair and maintenance work. Their service work capability usually includes alignment and front-end repairs, brake work, exhaust system work, tune-up, shock absorber and universal joint replacement, air-conditioning service and repair, cooling and heater system service and repair, fuel system work, ignition work, and power train-transmission service. In addition to these maintenance and repair services, the Car Care Center provides the consumer with a full line of tires, batteries, and automobile accessories. The Car Care Center concept was developed by Exxon to participate in the expanding market for automobile repair and services. The repair services provided at those Centers are guaranteed a any Car Care Center in the nation, not just the one which issues the warranty.

20. The following is a list of specialized equipment found at a "Car Care Center":

1. Start-a-Car Unit
2. Fuel pump tester
3. Bearing press package-17 ton
4. Wheel puller package including drivers, etc.
5. Brake shop-combination
6. Acetylene gas welding unit
7. ARC welding unit
8. Custom wheel adapter kit to handle all cars
9. Grand Prix adapter for ETC-10
10. Wheel bearing packer
11. Parts cleaner-air operated
12. Power washer package complete
13. Jacks-lifting package
14. Screw type stand 64" to 83" height 500 lb. rating-used for lifting

15. Brake stool
16. Air filter tester
17. PCV valve tester
18. Compression tester
19. Head gasket leak detector
20. Mechanics stethoscope
21. Inspection mirror
22. Brake Analyzer-dynamic
23. Static front end alignment
24. Alignment lift
25. Headlight tester

21. The following chart identifies the initial investment by Exxon in all of Exxon's existing company-operated stations in Maryland based upon dollar values at the time of the original investment by Exxon, broken down according to land, building and equipment.

EXXON'S INVESTMENT IN COMPANY-OPERATED STATIONS IN MARYLAND

		Type Station	Year Opened	Land	Buildings	Equipment	Total
1.	4434 Falls Road Baltimore, Md. 21211	Car Care Center	1966	$ 16,300	$ 86,200	$ 53,100	$155,600
2.	616 Frederick Road Baltimore, Md. 21228	Car Care Center	1969	113,600	129,300	49,300	292,200
3.	513-25 W. Mulberry Baltimore, Md. 21201	Conventional	1971	154,400	157,100	26,800	338,300
4.	6201 N. Charles Street Baltimore, Md. 21212	Conventional	1971	143,700	67,300	22,300	233,300
5.	1204 Reisterstown Road Pikesville, Md. 21208	Conventional	1974	45,100	39,100	17,700	101,900
6.	St. Rts. 26 & 32 Eldersburg, Md. 21784	Conventional	1971	290,600	109,400	37,200	437,200
7.	10840 Pulaski Highway White Marsh, Md. 21162	Conventional	1970	237,600	111,000	35,600	384,200
8.	11101 Georgia Avenue Wheaton, Md. 20902	Conventional	1971	-1	106,700	26,000	132,700
9.	6122 Edmondson Avenue Baltimore, Md. 21228	Conventional	1971	34,900	50,600	20,300	105,800
10.	6501 Pulaski Highway Baltimore, Md. 21237	Conventional	1970	11,200	40,500	25,700	77,400
11.	3220 Erdman Avenue Baltimore, Md. 21213	Car Care Center	1966	45,700	102,300	41,900	189,900
12.	5501 Park Heights Avenue Baltimore, Md. 21215	Car Care Center	1967	299,900	136,500	50,500	486,900
13.	1400 York Road Lutherville, Md. 21093	Car Care Center	1967	50,600	180,300	105,600	336,500

		Type Station	Year Opened	Land	Buildings	Equipment	Total
14.	Goldsboro & MacArthur Blvd. Glen Echo, Md. 20016	Conventional	1971	$ 56,200	$ 54,800	$ 16,000	$127,000
15.	900 E. Taylor Avenue Baltimore, Md. 21204	Car Care Center	1958	81,700	96,100	42,500	220,300
16.	1801 Gwynns Oak Avenue Baltimore, Md. 21207	Car Care Center	1966	47,000	88,200	38,100	173,300
17.	6200 Belair Road Baltimore, Md. 21206	Car Care Center	1967	168,100	119,600	48,100	335,800
18.	J. F. Kennedy Hwy. Aberdeen, Md. 21001	Turnpike	1963	-1	-1	67,400	67,400
19.	8029 Liberty Road Baltimore, Md. 21207	Car Care Center	1968	185,100	122,800	44,600	352,500
20.	4785 Allentown Road Camp Spring, Md. 20023	Conventional	1971	169,600	74,600	32,900	277,100
21.	8901 Central Avenue Capitol Heights, Md. 20027	Conventional	1972	31,800	95,600	37,100	164,500
22.	Rts. 50 and 450 Annapolis, Md. 21401	Conventional	1970	142,200	83,800	33,200	259,200
23.	5500 Norbeck Road Rockville, Md. 20853	Conventional	1970	-1	20,100[1]	19,500	39,600
24.	10611 Little Patuxent Pkwy. Columbia, Md. 21043	Car Care Center- Car Wash	1971	548,600	268,000	104,800	921,400
25.	7953 Washington Blvd. Waterloo, Md. 20794	Conventional	1970	148,500	81,900	25,600	256,000
26.	Mountain & Woods Roads Pasadena, Md. 21122	Conventional	1970	111,600	85,500	29,000	226,100

	Type Station	Year Opened	Land	Buildings	Equipment	Total
27.	1500 Sandy Spring Road Laurel, Maryland 20810	Conventional	1970	$187,500	$102,200	$ 40,500	$330,200
28.	301 Hungerford Drive Rockville, Md. 20850	Car Care Center	1972	403,600	394,400	67,800	865,800
29.	7253 Washington Blvd. Elkridge, Md. 21227	Conventional	1971	89,300	85,900	32,300	207,500
30.	Mountain & Old Annapolis Roads. Glen Burnie, Md. 21061	Conventional	1972	-1	152,700	49,900	202,600
31.	U. S. Rt. 1 & Md. 147 Benson, Md. 21018	Self-Service	1973	240,200	76,600	38,200	355,000
32.	2500 N. Howard Street Baltimore, Md. 21218	Conventional	1970	165,000	75,000	21,500	261,500
33.	8538 Liberty Road Randallstown, Md. 21133	Alert	1972	315,000	115,000	-2	430,000
34.	2100 S. Hanover Street Baltimore, Md. 21230	Alert	1972	-1	146,000	-2	146,000
35.	Ritchie Hwy. & Rt. 710 Glen Burnie, Md. 21061	Alert	1973	252,000	142,000	-2	394,000
36.	3023 Hammonds Ferry Rd. Lansdowne, Md. 21229	Alert	1973	74,000	101,000	-2	175,000

/1. The land and part or all of the improvements are leased by Exxon.

/2. These stations contain no investment in equipment.

22. The following table shows the volume of gasoline in thousands of gallons sold through Exxon branded stations in Maryland in 1973:

Total[1]	Company Operated	% of Total	Non-Company Operated[2]	% of Total
344,921.9	54,190.0	15.7%	290,731.9	84.3%

23. The following table shows the volume of motor oil, tires, and batteries sold through direct served Exxon brand stations in Maryland during 1973:

	Total	Company Operated	% of Total	Non-Company Operated[2]	% of Total
Motor Oil (gallons)	1,184,100	157,600	13.3%	1,026,500	86.7%
Tires (units)	85,891	11,831	13.8%	74,060	86.2%
Batteries (units)	27,850	4,378	15.7%	23,472	84.3%

24. In 1973 Exxon had retail sales at company-operated stations of $928,450 in house brand accessories, and $690,860 in other accessories and had labor revenue of $1,256,801. This is in comparison with wholesale sales by Exxon of house brand accessories to non-company operated stations of $1,110,905. Figures for other accessories and labor revenue at non-company-operated stations are not available to Exxon.

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[1] Includes 25,280,000 gallons sold by Exxon to resellers in Maryland in 1973.

[2] These figures reflect only wholesale sales by Exxon to noncompany operated stations. The dealers at these stations purchase additional quantities of these products from other sources and sell them at retail.

25. There is presently in force a contract between Exxon Corporation and the Maryland Transportation Authority dated November 15, 1973 for the operation of a gasoline service station at the turnpike facility at the Maryland House located on the John F. Kennedy Memorial Highway. The contract is for a period of five years with a right of renewal for an additional five years. The contract contains the following provisions, among others, concerning the operation of the facility:

a. Exxon agrees to operate the service station in a highly efficient manner, and to conduct its operations in accordance with the highest standards of management for service stations, to the end that the public may be served in the best possible manner and that public esteem may be won for Exxon, its service and products, and for John F. Kennedy Memorial Highway.

b. Prices charged for goods and services sold at the service station shall be no higher than, and the quality thereof shall be at least equal to, the prices and quality prevailing at service stations in the same general vicinity which are owned and operated by oil companies.

c. Exxon shall supply free service at least equal to such service supplied by service stations in the general vicinity which are owned and operated by oil companies.

d. Exxon is to operate the service station 24 hours a day every day of the week. Ample provision is to be made by Exxon for speedy and convenient handling of patronage during all hours.

e. Exxon shall have a sufficient number of trained and uniformed attendants on duty at all

times to conduct properly the business of a gasoline service station. All employees of Exxon working on the premises must be thoroughly familiar with the location of interchanges in order to direct motorists, intelligently, and they must know the emergency services, including doctors, hospitals, and ambulances, available in the general vicinity of the service area.

f. Exxon is to furnish roadside service for disabled vehicles, including two modern service trucks of good appearance and in first class mechanical condition available 24 hours a day on standby service. Exxon shall perform its duties in such a manner as to furnish adequate call service to highway patrons within 20 minutes from the time Exxon is notified. The equipment operators must at all times be courteous and present a clean and neat appearance. They shall obey and respect all rules and regulations of the Authority. The Operator shall encourage each equipment operator to obtain a certificate of completion of the standard 22-hour Red Cross first-aid training course when and if practical and shall permit operators to attend such course during regular working hours without deduction from such operator's pay, when and if arrangements can be made for such training.

26. The following is a list of innovative marketing concepts or products tested at stations operated by Exxon in Maryland and elsewhere, with an explanation of each concept or product.

1. *Partial self service.* Several years ago Exxon tested self-service operation at one island in a number of company-operated stations in different

markets. This experiment lasted for some two or three years. When, in Exxon's opinion, it was found to be successful and the techniques adequately developed, Exxon encouraged dealers to consider partial self-service where legal and suitable in order to enable them to compete for a broader spectrum of customers. Exxon made the program available to dealers upon request at no cost. Exxon's cost was approximately $750 per station. Among the problems and issues dealt with during this experiment were the following: a) the type of equipment and collection system which is most convenient and acceptable to the motorist; b) the most effective means of communicating to the motorist as he enters the station that one island is self-service and the other is full service; c) special problems which arise in the operation; d) whether credit cards should be accepted at the self-service island; e) the number of customers who convert from full service to self-service. In Exxon's opinion the resolution of these kinds of issues could only be accurately obtained by close control of operating procedures and monitoring of the results, best performed at company-operated stations.

2. *Valucenter advertising and promotion.* The valucenter concept of cooperative advertising and sales promotion was tested at Car Care Centers and after, in Exxon's opinion, proving successful, was expanded to include dealers who wished to participate.

3. *Manning guidelines.* During the gasoline shortage in 1973, new manpower productivity guidelines were developed at direct operated stations and were passed on to dealers, as

counseling guidelines, through the sales representatives. These guidelines would, in Exxon's opinion, assist a dealer in controlling his largest expense – manpower – during the time of shorter hours and fewer days and, at the same time, help to maximize customer convenience.

4. *Certification of mechanics.* The National Automotive Institute for Service Excellence (NAISE) and automobile manufacturers decided to certify mechanics through their organization as being competent for repairing automobiles. Initially, this program would have included only mechanics of automobile dealers. As a result of being in the Car Care Center business, Exxon, with the help of the American Petroleum Institute, was able to get NAISE to expand the program to include service station mechanics. Further, through the experience of its Car Care Center mechanics taking the test of certification, Exxon was able to advise its dealers of the kinds of training needed prior to taking the tests and also was successful in getting the certification of mechanics by NAISE broken down into about eight categories of expertise rather than having only one category of Master Mechanic.

5. *Automotive exhaust emission.* As a result of operating Car Care Centers, Exxon became interested in testing various manufacturers' equipment which is designed to test the exhaust emissions of automobiles. In Exxon's opinion some of the equipment was found to be reasonably acceptable. Others were found to have problems. With the help of a research division of Exxon, the Company was able to develop reasonable equipment and

procedures for testing exhaust emissions. Subsequently, the State of New Jersey required automobiles licensed in that state to be inspected and adjusted to a minimum level of exhaust emissions. As a result of Exxon's work in its company-operated stations, Exxon was able to qualify quickly all such stations in New Jersey and many of its dealers to the extent that they were licensed by the State of New Jersey to conduct these tests and make necessary adjustments to the customer's car. With about 15% of the service stations in New Jersey, Exxon had better than 50% of those licensed by the State to test exhaust emissions.

6. *In-bay car wash units.* A number of in-bay units were tested at company-operated stations. As a result Exxon was able to advise its dealers as to which pieces of equipment to avoid and which to use and at the same time developed a set of operating guidelines which were made available to dealers.

7. *Add-on air conditioners and tape decks.* Exxon tested the sale of these items at company-operated stores and found that, in Exxon's opinion, they were highly expensive items and that the degree of expertise needed to actively compete with specialty stores in these items made them non-profitable. As a consequence, Exxon advised its dealers to avoid these items of merchandise.

8. *Exact cash or credit card after dark.* Due to the high incidence of robberies at service stations, the company tested a procedure of accepting only cash in the exact amount of the purchase or credit cards for sales made after dark. This program

subsequently was offered to Exxon dealers, and the incidence of robberies at stations which adopted this practice has declined significantly.

9. *Automotive repair and diagnostic equipment.* The company tested various types of repair and diagnostic equipment at Car Care Centers and planned to recommend types of equipment and procedures to its dealers. Automobile diagnosis at the time of this test was, in Exxon's opinion, a popular item in the marketplace. The dynamometer, a loaded mode diagnostic equipment device, was very expensive and difficult to utilize profitably. Consequently, the company dropped this kind of equipment at company-operated stores and did not recommend to its dealers to participate in this effort. Exxon has tested idle mode diagnostic equipment, and is currently preparing to test muffler diagnostic equipment. Various types of automotive repair equipment have also been tested at company-operated stations, including, for example, those for front-end alignment.

10. *Motor oil vending machines.* Motor oil vending machines were tested at full self-service company-operated service stations. The negative results from the test led Exxon to advise dealers not to invest in the machine.

27. Exxon recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it does, in order to meet competition from other suppliers, temporarily reduce its wholesale price or grant temporary allowances to its

dealers or resellers without making price reductions or allowances throughout the State.

28. The normal business practice of Exxon is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide.

29. Some of Exxon's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including, for example, the District of Columbia and West Virginia.

30. Exxon is not aware of any violations of law by Exxon in the use of any voluntary allowances in the State of Maryland.

31. Exxon has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications for various reasons.

32. When Exxon leases a service station facility to a dealer, such Exxon owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Exxon owned equipment, such as identification signs and credit card imprinters, are separately rented to the dealer.

33. An investigation was conducted on January 29 and 30, 1974 by auditors of the Gasoline Tax Division of the Comptroller's Office, Early W. Bates and Charles C. Downs, to determine whether the allocation of gasoline by Exxon to some 30 stations selected at random by the auditors was fair and equitable. These auditors conducted a subsequent investigation on February 19 and 20, 1974 to review the allocation to Exxon's company-operated stations. The conclusion

reached by the auditors upon the completion of their investigations was that Exxon was allocating its supply to dealers properly vis-a-vis its company-operated stations.

(signature of Counsel:)

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APPENDIX B
Statement of Facts Pertaining to
Continental Oil Company
and
Kayo Oil Company

1. The Continental Oil Company (hereinafter referred to as "Continental") is a Delaware Corporation which was formed effective October 8, 1920. The duration of its charter is perpetual. The stock of Continental is publicly held and traded. Its principal

offices are located in Houston, Texas, Stamford, Connecticut and Ponca City, Oklahoma.

2. Continental is a company involved in exploration for and production of crude oil and natural gas and in the refining, transportation and marketing, at both the wholesale and retail levels, of a wide range of petroleum products.

3. Continental does not produce or refine petroleum products or motor vehicle fuels in Maryland.

4. Continental does not have any independent service station dealers in Maryland. It does not sell branded "Conoco" gasoline in that state.

5. The petroleum products which Continental brings into the State of Maryland are refined by it at its Westlake, Louisiana refinery. The petroleum products are then transported through the Colonial Pipeline to Continental's Baltimore terminal. Continental's products (gasoline and distilates) are sold to purchasers doing business in Maryland as well as to purchasers located in states other than Maryland, such as Pennsylvania, Virginia and the District of Columbia. With respect to the purchasers doing business outside of the State of Maryland, a substantial part of the volume is delivered by Continental by its own trucks or common carriers engaged in interstate commerce.

6. The petroleum products distributed by Continental within the State of Maryland are received from the Colonial Pipeline, in that no other significant volume of petroleum products are received from any other transportation sources. The petroleum products sold in Maryland through the filling stations operated by Kayo Oil Company and the petroleum products sold to Continental's wholesale customers at its Baltimore

terminal, through the Onco Division of Continental Oil Company, receive no additives at Continental's Baltimore terminal of the Colonial Pipeline. The only additives that are added to Continental's product are pipeline corrosion and oxidation inhibitors which are added at Continental's Louisiana refinery, prior to transportation through the Colonial Pipeline into the State of Maryland.

7. As of June 30, 1975, Continental employed 225 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 – $3,350,000.00
1972 – $2,650,000.00
1973 – $2,610,000.00
1974 – $3,136,000.00

8. Continental sold to wholesale purchasers from its Baltimore terminal, excluding petroleum products distributed to Kayo Oil Company, the following amount of petroleum products for the years 1970 through the first seven months of 1975:

1970 – 12,457,000 gals.
1971 – 14,573,000 gals.
1972 – 13,207,000 gals.
1973 – 13,214,000 gals.
1974 – 15,706,000 gals.
1975 – 9,903,000 gals.
(7 mos.)

9. Continental owns 100% of the capital stock of the Kayo Oil Company (hereinafter referred to as "Kayo").

10. Kayo is a Delaware corporation formed effective April 29, 1959. The duration of its charter is perpetual. Its principal and only office is located in Chattanooga, Tennessee.

11. Kayo is a gasoline marketing company and, therefore, has neither producing or refining capacity, nor terminals or bulk plants.

12. Kayo is a large private brand retail marketer of gasoline.

13. Kayo has 80 supervisory districts and each district is under the supervision of a manager. The manager has no staff and no separate or private office. He works out of one of the gasoline stations located within his district. Kayo has 16 area managers (the area manager supervises approximately 5 districts). The area managers have no staff working for them and also operate out of gasoline stations located within the area. Most, if not all, of Kayo's management have worked their way up to supervisory positions through promotions within the organization.

14. Kayo qualified to do business in the State of Maryland on January 10, 1964. Kayo presently operates 14 filling stations in Maryland. There are six Kayo stations in Baltimore City and eight filling stations located in various other counties in Maryland.

15. Kayo obtains all of its gasoline which it sells at its retail outlets in Maryland from Continental. The gasoline is distributed to Kayo by Continental from Continental's Baltimore terminal, by means of Continental's trucks and common carriers, after the same has been shipped to the Baltimore terminal through the Colonial Pipeline.

16. Kayo does not produce or refine petroleum products or motor vehicle fuels in Maryland.

17. Kayo's Maryland stations were either built from the ground up by Kayo or were stations purchased by Kayo and structurally modified to conform to the Kayo

system of retail marketing. Kayo's investment in its existing company owned and operated stations in Maryland is as follows, as of June 30, 1975 – $676,525.00.

18. In 1972, 14,964,980 gallons of gasoline were sold by Kayo stations in Maryland; in 1973, 15,952,928 gallons of gasoline were sold by Kayo stations in Maryland; in 1974, 13,396,566 gallons of gasoline were sold by Kayo stations in Maryland; and during the first half of 1975, 6,550,868 gallons of gasoline were sold by Kayo stations in Maryland.

19. The comparative sales by Continental to its wholesale purchasers from its Baltimore terminal and the total number of gallons of gasoline sold by Kayo stations in Maryland are set forth in the following table:

Year	Continental Sales to Wholesalers	Kayo Sales to the Public
1972	13,207,000 gals.	14,964,980 gals.
1973	13,214,000 gals.	15,952,928 gals.
1974	15,706,000 gals.	13,396,566 gals.

20. As of June 30, 1975, Kayo employed 85 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 – $500,000.00
1972 – $568,000.00
1973 – $405,000.00
1974 – $310,079.00

APPENDIX C

Facts Particular to Shell

1. Shell Oil Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices at One Shell Plaza, Houston, Texas.

2. Shell Oil Company (hereinafter referred to as Shell) was incorporated on February 8, 1922.

3. Shell is a company involved in exploration for and production of crude oil and natural gas and in the refining of crude oil, and the transportation and marketing, at both the wholesale and retail level, of a wide range of petroleum products.

4. Shell branded gasoline is sold at approximately 8,900 direct-served retail outlets located in 40 states and the District of Columbia.

5. Shell has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Shell branded gasoline in the State of Maryland have all of their gasoline supplied from outside the State.

6. Gasoline sold under the Shell brand in the State of Maryland primarily comes from Shell's refineries at Deer Park, Texas and Norco, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Domestic crude oil refined at Deer Park primarily comes from Texas and Louisiana. Domestic crude oil refined at Norco primarily comes from Louisiana.

7. Gasoline produced at Deer Park, Texas and Norco, Louisiana refineries is transported to two terminals which supply customers in Maryland. These terminals

are located in Springfield, Virginia and Wagner's Point, Maryland. The gasoline is normally brought to the Springfield terminal by common carrier pipeline and to the Wagner's Point terminal by tanker.

8. The majority of Shell brand motor oil sold in Maryland comes from the Deer Park and Norco refineries where the base stock is made.

9. As reflected in the Motion For Partial Summary Judgment filed August 6, 1975, Shell does not believe that it is engaged in producing, blending or compounding motor vehicle fuels in the State of Maryland. Prior to distribution from Shell's Springfield, Virginia and Wagner's Point, Maryland terminals, additives are injected into gasoline and, in those rare instances when the product quality does not meet specifications, some premium gasoline is added.

10. All of the petroleum products sold by Shell at retail to the public in the State of Maryland are transported into the State of Maryland in interstate commerce.

11. Shell markets its products nationally through the full range of retail facilities. As of June 30, 1975, Shell operated 180 tunnel car wash stations, 135 self-serve stations, 15 gasoline only stations, 4 self repair stations and 50 conventional full service stations nationwide.

12. Shell has traditionally marketed its gasoline through independent retailers and wholesalers rather than through company operations. As of June 30, 1975, Shell operated with company personnel 384 service stations nationwide, representing approximately 4.3 percent of the approximately 8,900 Shell direct-served retail outlets.

13. As of June 30, 1974, Shell had 1 company-operated facility in the State of Maryland, representing approximately 0.5 percent of all directly operated facilities in Maryland at which Shell branded petroleum products were sold.

14. Shell's one company operated Maryland facility is a conventional full service station. Shell's initial investment in that station, based upon dollar values at the time of original investment, was $49,285 for improvements, $36,630 for equipment and $12,800 for the 1973 ground lease rental payments; the lease for that property extends through 1988.

15. As of June 30, 1974, Shell had 196 stations operated by independent lessee dealers in Maryland. Shell currently has 7 branded jobbers in Maryland.

16. The following table shows the number of company-operated and direct-served dealer operated facilities in the State of Maryland selling Shell branded products for the years 1971 through the first six months of 1974:

	PERIOD AS OF			
	12/31/71	12/31/72	12/31/73	6/30/74
Company Operated	0	0	1	1
Dealer Operated*	203	206	206	196

*This includes dealer facilities which are either leased from Shell or another or owned by the dealer.

17. The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in 1973:

TOTAL	COMPANY OPERATED	% OF TOTAL	NON-COMPANY OPERATED	% OF TOTAL
148,266,866	1,477,639	1%	146,789,227	99%

18. The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in the first six months of 1974:

TOTAL	COMPANY OPERATED	% OF TOTAL	NON-COMPANY OPERATED	% OF TOTAL
68,558,649	793,104	1.2%	67,765,545	98.8%

19. The following table shows the volume of tires and batteries sold through Shell branded direct-served facilities in the State of Maryland in 1973:

	TOTAL	COMPANY OPERATED	% OF TOTAL	NON-COMPANY OPERATED*	% OF TOTAL
Tires (units)	29,279	155	0.5%	29,125	99.5%
Batteries (units)	10,329	25	0.2%	10,304	99.8%

*These figures reflect only wholesale sales by Shell to non-company operated stations. The dealers at these stations may purchase additional quantities of these products from other sources and sell them at retail.

20. In 1973 Shell's company-operated station had retail sales of $11,044 in house brand tires, batteries and accessories. This is 0.6% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

21. In the first six months of 1974, Shell's company-operated station had retail sales of $7,968 in

house brand tires, batteries and accessories. This is 0.7% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

22. The hours of operation at Shell's company-operated station have been as follows:

DATE	HOURS OF OPERATION
3/1/73-12/15/73	24
12/15/73-1/15/74	18 (6 a.m. - 12 p.m.)
1/15/74-5/1/74	12 (6 a.m. - 6 p.m.) (closed Sundays)
5/1/74-	15 (6 a.m. - 9 p.m.) (open Sundays)

23. Though Shell has only one company-operated station in Maryland, the following is a list and explanation of innovative marketing concepts and products tested nationally at Shell company-operated stations:

Full self-service – This type of retail outlet allows the consumer to perform all required services, including the dispensing of automotive gasoline.

Gasoline only – In this type of outlet, the consumer is offered, by an attendant, only gasoline and other pump island services.

Tunnel car wash – This denotes an outlet that offers specialized equipment for washing an automobile. Although such equipment may be found in both dealer and company operated stations, it will generally not be found at dealer operated stations due to the large capital investment required.

Self-repair – This type of outlet, which is currently being evaluated by Shell, offers the consumer, in addition to gasoline, all the necessary tools and facilities to repair his own automobile. The customer rents a service bay at a per hour cost and he has use of all tools and instruction manuals. There is also a technician on duty.

Mini-mart – This type of outlet, which is currently being evaluated by Shell, would offer the consumer, in addition to some or all of the traditional services and products, various non-petroleum related products to satisfy his needs.

Motor lab – This type of outlet was based on the viability of certain diagnostic and repair equipment. After thorough testing and evaluation, it was determined that such equipment did not meet marketing needs and standards.

Express oil changer – Through an Express vacuum stick which removes used automobile oil, the express oil changer allows the customer to perform an inexpensive, clean and fast oil change.

Computerized gasoline pump – This allows a customer to fulfill gasoline, motor oil and car wash and wax needs at all times and without delay. The pump accepts either cash or credit card for the products and services selected.

Pilfer – proof oil merchandiser – This is a display stand with the capacity to hold 48 quarts of motor oil. Due to its locking mechanism, it dispenses with the necessity of securing the merchandise when the station closes and thus allows for continuous display of the product. It also contains a protected area for a credit card imprinter and a light weight oil can disposal unit.

Autosense – This computer oriented device identifies all automobile repair needs. It improves productivity by

releasing mechanics for repairs and eliminates the possibility of human error.

Shell gasoline and motor oil is constantly being tested and evaluated.

24. Shell recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it has, in order to meet the equally low price of a competitor of Shell, temporarily reduced its wholesale price or granted temporary allowances to its dealers or jobbers without making a general price reduction or allowance throughout the State.

25. The normal business practice of Shell is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide.

26. Shell has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications.

27. When Shell leases a service station facility to a dealer, the Shell owned equipment at the station is included in the lease agreement.

28. From January 1974 to September 1, 1975, the sale of gasoline in Maryland and in the United States was regulated by the federal government pursuant to the Emergency Petroleum Allocation Act of 1973 and the regulations issued thereunder.

Counsel for Defendants

Counsel for Plaintiff
SHELL OIL COMPANY

APPENDIX D
Stipulated Facts Concerning Gulf Oil Corporation

1. Deleted.

2. Gulf Oil Corporation ("Gulf"), a Pennsylvania corporation, is involved in exploration for and production of crude oil and natural gas and in refining, transporting and marketing, at both the wholesale and retail levels, of a wide range of petroleum products. Gulf branded gasoline is sold at approximately 18,430 retail outlets throughout the United States. Gulf also has interests in coal, atomic energy and other resources which could become energy producing in the future.

3. Gulf has done business in Maryland for more than 40 years, and is the third leading supplier of gasoline in Maryland, selling to dealers, wholesalers, the public and others approximately 9% of all the gasoline sold in Maryland. All of the gasoline sold by Gulf in Maryland is transported into the state from refineries located beyond the borders of the state.

4. In 1936 Gulf opened its first modern service stations in the Baltimore area. Prior to that time, Gulf had some bulk plants in Maryland and operated on a limited basis at the wholesale and retail levels in the state.

5. Insofar as petroleum products are concerned, operations by Gulf in Maryland are limited to storage, distribution and marketing.

6. Gulf is not engaged in the producing of motor vehicle fuels in the State of Maryland.

7. In rare instances, upon notification from the State of Maryland that Gulf's product is not in compliance with state required specifications, Gulf mixes different grades or types of gasoline in order to bring the product into compliance. For example, Gulf may add premium gasoline to regular grade gasoline with too low an octane rating. The product would then be sold as regular gasoline. Also, if the lead content of a small volume of low-leaded gasoline is too high, it may be added to a large volume of low-leaded gasoline, so that the lead content of the resulting product is within specifications.

8. Deleted.

9. Since Gulf has no crude oil production or petroleum refineries in Maryland, purchasers of Gulf branded gasoline in Maryland have all of their gasoline supplied from and refined out of state. Gulf refined products reach the Maryland market as follows:

a. Gasoline from Port Arthur, Texas, and Alliance, Louisiana, enters the State of Maryland via the Colonial Pipeline. Gasoline from Philadelphia, Pennsylvania, enters the State of Maryland either by barge or truck.

b. Three Gulf terminals serve customers in Maryland. These are located at Baltimore and Salisbury, Maryland, and Fairfax, Virginia. The Baltimore and Fairfax terminals are supplied by the Colonial Pipeline. The Salisbury terminal is supplied via barge from Philadelphia. Customers in Maryland are also served by bulk plants in various parts of Maryland and one bulk plant in Delta, Pennsylvania. Some of these bulk plants are supplied by truck from the various terminals; others are supplied directly by barge from Philadelphia.

c. All motor oils sold in Maryland originate from the Philadelphia refinery, and are shipped by truck to terminals and bulk plants in Maryland, Fairfax, Virginia and Delta, Pennsylvania.

d. All greases are packaged by the Port Arthur refinery and shipped via tanker to Philadelphia, and thereafter by truck to terminals and bulk plants.

10. In 1974, 87,768,000 gallons of gasoline were sold by Gulf service stations in Maryland; in 1973, 82,983,000 gallons of gasoline were sold by Gulf service stations in Maryland.

11. Gasoline from out-of-state refineries is transported to Gulf's terminals in Baltimore and Salisbury and to bulk plants in various parts of Maryland from which retail gasoline outlets in Maryland and elsewhere are supplied. Some Maryland retail outlets are supplied from out-of-state terminals or bulk plants. Based upon August 1975 crude runs, which are typical, all of the Gulf gasoline sold in Maryland is refined at either Gulf's Port Arthur, Texas, refinery, its Alliance, Louisiana, refinery or its Philadelphia, Pennsylvania, refinery. More than half of the crude oil processed at Gulf's Alliance and Port Arthur refineries is of domestic origin, with the balance imported from Nigeria or from Cabinda, West Africa. All of the crude processed at Gulf's Philadelphia refinery is imported from Venezuela, Nigeria and Cabinda, West Africa.

12. Tires, batteries and accessories sold at Gulf retail outlets, both company-operated and dealer operated, are manufactured by companies other than Gulf in various places outside of the State of Maryland and shipped into Maryland in interstate commerce.

13. The consumer in Maryland is served by various kinds of Gulf retail gasoline outlets. These include 1 major service center, 2 drive through car wash facilities, 8 stations having in bay car wash facilities, 101 merchandisable service stations (i.e. full service), 3 full and 12 partial self service stations. The balance of the Gulf retail outlets in Maryland consists of country grocery stores (Ma and Pa) with gasoline pumps, small garages and other diversified businesses with gasoline pumps, these being the facilities that, in Gulf's opinion, fill the needs of the communities in which they are located.

14. In Gulf's opinion Gulf can best serve consumers and itself by using different types of retail gasoline outlets and marketing methods, and Gulf has in fact, where possible, varied its marketing methods in response to market conditions.

15. Since approximately 1952 Gulf has marketed its gasoline primarily through independent retailers and wholesalers rather than through company operations.

16. As of September, 1975, there are approximately 218 independent dealer stations in Maryland buying Gulf gasoline directly from Gulf, of which approximately 109 leased stations from Gulf and 109 own their own stations or lease them from parties other than Gulf. There is one company-operated Gulf station in Maryland. If it is permitted to continue to own and operate retail service stations in Maryland, Gulf anticipates owning and operating approximately 22 retail gasoline outlets within the next five years.[1] Gulf

[1] Nineteen of the 22 are presently operated by lessee dealers; two are temporarily closed and under reconstruction; and one is already company owned and operated. As to the 19 lessee dealers, Gulf's policy and intention are to attempt to negotiate a buyout of their operations. Any lessee dealers who decline to sell may remain in business as usual.

has refrained from commencing ownership and operation of these stations[2] pending this litigation.

17. Gulf's experience with company-operated service stations shows that under certain circumstances, company operation is a more efficient mode of direct marketing of gasoline by Gulf. Through direct company operations, Gulf can control hours of operation and service and may respond quickly to price changes in the market. In Gulf's opinion, direct company operations can result in significantly lower selling costs per gallon of gasoline than a traditional dealer operated station. These reductions in selling costs might be passed on to the consumer in the form of lower gasoline prices.

18. The ability to market through company-operated stations allows Gulf to experiment with innovative, competitive marketing techniques. Such outlets represent an alternative marketing technique, rather than an exclusive mode of marketing. However, in certain circumstances, company-operated stations represent the most desirable and efficient retail technique, from the standpoint of Gulf.

19. From Gulf's viewpoint, other possible advantages of company-operated stations are:

a. High standards of service and cleanliness
b. High standards of design; generally attractive appearance
c. Longer hours of operation to serve the public
d. Fast "no frills" sales, for that portion of the public which desires them.

[2] (except for one station owned and operated since prior to the commencement of this litigation)

20. Company-operated stations can be used for testing new market techniques. For example, Gulf first tested its "Tire Hut" discount auto, home and garden outlets at company-operated stations outside of Maryland.

21. In Gulf's opinion Gulf company-operated stations are able to quickly and effectively respond to changing market conditions. During times of shortage, Gulf's control over its company-operated stations would permit Gulf to coordinate hours of operation in order to attempt to lessen the hardship on motorists.

22. Deleted.

23. In Gulf's opinion the divorcement of Gulf's company-operated station will diminish its value. Furthermore, the provisions of the Maryland Act which prohibit Gulf from operating retail service stations in Maryland will prec'ude the conversion of any Gulf properties in Maryland to company owned and operated service stations.

24. Gulf's investment in its existing company-operated station in Maryland is as follows:

Land	$ 78,510.00
Building	53,424.00
Equipment	33,977.00
TOTAL	$165,911.00

25. The granting of price differentials and allowances has been a normal business practice of Gulf.

26. Gulf stations in Maryland serve a market composed of consumers operating both in interstate and intrastate commerce. A sampling of consumers in interstate commerce includes: truckers – Chemical Leaman, Carolina Freight, Eastern Express, Johnson

Motor Lines and O'Boyle Tank Lines; railroads – The Chessie System, Penn Central Railroad and Southern Railway System; airlines – Eastern, BOAC, Braniff, TWA, Northwest Orient and National. Maryland borders several jurisdictions – Delaware, Pennsylvania, West Virginia and the District of Columbia. Maryland falls within the Washington-New York-Boston Corridor and lies between the major metropolitan areas of Washington, D.C. and Wilmington-Philadelphia.

27. Gulf recognizes certain competitive trading areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such trading areas it has, in order to meet competition from other suppliers, granted temporary competitive allowances to its dealers or resellers without granting such allowances throughout the state.

28. Some of Gulf's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including the District of Columbia, Virginia, Delaware, Pennsylvania and West Virginia.

29. The normal business practice of Gulf has never included any program whereby it extended temporary competitive allowances "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide. Gulf is not aware of any violations of law by Gulf in the use of any such allowances in the State of Maryland.

30. When Gulf leases a service station facility to a dealer, such Gulf owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Gulf owned equipment, such as identification signs and

credit card imprinters, are separately rented to the dealer. Gulf does not apportion the rental for a fully equipped service station between the equipment included in the lease and the real estate.

31. Gulf has on occasion granted to its lessee dealers in Maryland rental abatements or modifications for various reasons.

32. Deleted.

/s/ Lawrence S. Greenwald,
Attorney
for Gulf Oil Corporation,
Plaintiff

/s/ John A. Woodstock, Attorney
for
Defendants

APPENDIX E

Statement of Facts Particular to Phillips Petroleum Company

1. Phillips Petroleum Company ("Phillips") is an integrated petroleum company based in Bartlesville, Oklahoma.

2. Phillips is engaged in production, refining, processing and marketing of petroleum products of all varieties and various derivatives of petroleum. It has six domestic crude oil refineries, all of which are located west of the Mississippi River, two in Texas, one in Kansas, one in Utah, one in Montana and one in California. A subsidiary, Puerto Rico Core, Inc., owns and operates a petrochemical manufacturing plant in Puerto Rico that uses chemical feedstocks but produces some gasoline as a by-product.

3. The crude oil production of Phillips is mainly in the Mid-Continent region of the United States. There is, of course, some production from foreign sources.

4. Phillips engages in no crude oil production and has no petroleum refineries within the State of Maryland. All Phillips branded refined petroleum products available at Phillips branded stations in Maryland are supplied from outside the State. Insofar as Phillips' operations in Maryland related to refined petroleum products are concerned, Phillips is only a supplier and a marketer. Phillips does lease segregated bulk storage tanks for refined products at the Amerada-Hess terminal in Baltimore.

5. Phillips was incorporated in the State of Delaware in 1917. At one time it marketed in all of the 50 states

and at present it markets to some extent in all of the states except Alaska and Connecticut.

6. For purposes of marketing, the company operations are divided into three geographic regions, a Western Region, a Central Region and an Eastern Region, as shown on the map (which is attached hereto as Exhibit A.) The State of Maryland is within the Eastern Region. In marketing petroleum products, Phillips is a wholesale supplier of gasoline, distillates, motor oils and greases to jobbers, dealers and ultimate consumers.

7. Phillips also is a wholesale supplier of tires, batteries, accessories and sundry items of merchandise. Phillips also is a retailer of the same products and also service work in Phillips branded, salary operated service stations. In some situations, Phillips sells all of these items except service work, and in some instances, except tires, batteries and accessories, in secondary or private branded stations.

8. During the period January 1, 1969 to date, substantially all of the automotive gasoline marketed by Phillips, other than through its own salaried service stations, was marketed by selling to independent businessmen or companies that are not employees or agents of Phillips. Phillips has been basically a jobber oriented company, by which is meant that it historically has sold its branded products to wholesale distributors (jobbers) for resale through their own service stations or to independent dealers operating service stations. Phillips does sell some of its refined petroleum products directly to some of the independent dealers.

9. Jobbers are independent businessmen or companies who purchase petroleum products direct from Phillips and either market them through their own facilities or resell to their wholesale consumers or their dealers for further resale to retail consumers. Nationwide through the years 75% to 80% of Phillips products has been sold to jobbers. Today about 67% of all gasoline which Phillips sells in Maryland is sold to jobbers. Approximately 17% is sold direct to the public through Phillips salaried service stations, and about 16% is sold directly to independent dealers who also are usually independent businessmen who employ one or more people either on a part-time or full-time basis to operate a one or a multi-bay service station offering a line of gasoline and other petroleum products and allied services and items within their discretion.[1] Some of these dealers own their service stations but most lease their service stations either from Phillips or from Phillips jobbers or third parties.

10. Nationwide during the 1969-1973 period the ratio of salary operated service stations to the total

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	1973		1974	
	% of Business	Gallons	% of Business	Gallons
Salaried Operations	20.16	7,364,690	17.2	5,077,551
Direct Dealers	17.34	6,335,444	15.89	5,520,253
Jobbers	62.50	22,837,487	66.91	23,245,570
Total	100.00	36,537,621	100.00	34,743,334

In 1974 Phillips salaried service stations and direct dealers (i.e., independent dealers buying refined petroleum products directly from Phillips) shared a smaller percentage of the refined petroleum products sold directly to the public than in 1973; correspondingly, the percentage of sale by jobbers increased.

number of retail outlets for Phillips products varied from a high of about 5.4% to a low of 1.6% during such period. In Maryland, for this same period, the ratio of salary operated service stations to the total number of retail outlets[2] varied from a high of 14.05 percent to a low of 7.88 percent. Attached hereto as Exhibit B is a statement of the approximate number of outlets for Phillips products operated during 1974 within the various geographic regions and the percentage thereof that were salary operated by Phillips.

11. In Maryland at present, there are approximately 121 retail outlets for Phillips products, of which 13 are salary operated units. Nationwide there were on November 25, 1974 approximately 17,000 total retail outlets for Phillips products, of which number exactly 1,043 were salary operated units. A precise total as to the number of salary operated units can be given because these are a matter of company record and are under Phillips' immediate control. Phillips cannot at any time be absolutely certain as to the total number of outlets throughout the country or within any individual state because it does not control the entrance into business or the exit from business of dealers who sell petroleum products under the Phillips signs but who have their contracts with jobbers and not withPhillips, nor can it control the number of jobber operated stations. Phillips leases to jobbers a quantity of Phillips signs and credit card imprinters and the jobbers utilize these within their sole discretion in putting new dealers in business. Jobbers can acquire new dealers or open stations with their own employees at any time without any prior notice to Phillips or without any control by

[2]The number of the total retail outlets for Phillips products is an approximate figure, both for Maryland and nationally. For the reasons for the unavailability of accurate figures, see Paragraph 11.

Phillips over such acquisition or any later termination of the dealers. It would take a day-to-day count of these locations as actually in place and operating for Phillips to be able to ascertain with even approximate accuracy the number of outlets selling Phillips products on any specific day.

12. Of the 1,043 company operated outlets, which includes 13 Maryland outlets, some sell Phillips' principal brands only and others sell secondary brands only. The ratio between these categories varies almost daily. Nationally, from 1969 to 1973 Phillips' distribution of branded product by sale to wholesale distributors for resale decreased from 54.2 percent to 48.2 percent, while unbranded sales to wholesale distributors increased from 16.5 percent to 24.8 percent. To the contrary, in Maryland during the same period of time branded sales increased from 55.7 percent to 62.5 percent, but there has never been any unbranded sales by Phillips to wholesale distributors in Maryland.

13. Although Phillips Petroleum Company is a large producer and refiner of petroleum products, it does not produce or refine in Maryland. Phillips first began operating in Maryland as a marketer of petroleum products in 1960. It presently is qualified to do business in the State of Maryland and has been so qualified since 1960. Phillips markets its refined petroleum products in Maryland under the principal Phillips brands, such as Phillips 66 Regular, Phillips 66 Premium, and Phillips 66 Unleaded and also under its secondary or private brands such as Way-Lo Regular, Way-Lo Premium, and Way-Lo Unleaded. These trade names or brands are registered federally and also in Maryland.

14. A good portion of the service stations operated by jobbers or by jobbers' dealers are either owned in fee by the jobbers or leased by them from Phillips or from third parties. Phillips exercises no control over the day-to-day operations of the independent dealers whom it supplies directly or over the independent jobbers. Where real estate leases are in effect there are, of course, some limitations and some requirements related to use of the premises. In all instances, there is some control exercised as necessary to protect quality of products, to avoid adulteration of products and to protect brands. The setting of retail prices at stations operated by jobbers, direct dealers or jobber-dealers is at the sole prerogative of the jobber, direct dealer or jobber-dealer.

15. Phillips does not market any refined petroleum products within Maryland that are produced or refined in the State. All of Phillips' petroleum products move into Maryland in interstate commerce from refineries located outside of Maryland. The tires, batteries and accessories sold in Phillips' salary-operated service stations in Maryland also come into such state in interstate commerce.

16. At present, of the approximate total of 121 marketing outlets in Maryland for the retail sale of Phillips' brands of gasoline and other petroleum products, approximately 108 are service stations operated by persons or companies who are not Phillips' company personnel, subsidiaries, or commissioned agents, but who buy gasoline and other petroleum products from Phillips for wholesale or retail sale. 88 of these stations are operated by jobbers or by dealers of jobbers, and the remaining 20 are operated by dealers supplied directly by Phillips. The other 13 service stations within Maryland are operated by salaried

personnel of Phillips, with 10 selling only Phillips' principal brands and 3 selling only Phillips' secondary Way-Lo brands.

17. At the present time Phillips owns in fee only 5 service station properties in the State of Maryland. All 5 are leased directly to dealers. Phillips presently leases from others 44 service stations in Maryland of which it subleases 17 to jobbers and 9 to direct dealers, operating 13 with its company employees. Five of these leased stations are presently vacant or are being rented by third parties for other purposes than retail marketing of Phillips' products. The following is a resume of Phillips' investment in marketing properties in Maryland.

Phillips service station investment	$1,348,853.88
Phillips loaned equipment investment[3]	150,201.20
Phillips TBA lube warehouse investment[4]	19,641.72
Total	$1,518,696.80

The above are net figures as of a time within the last six (6) months as to each property, after deducting depreciation; initial investments were greater.

18. Attached hereto as Exhibit C[5] is a list of the thirteen (13) Phillips service stations operated in Maryland by Phillips personnel. The list includes the company station number, the type of operation and approximate net investment of Phillips. The "Private Brand Express" label identifies the three secondary brand, Way-Lo, stations which are not full service

[3]Phillips loaned equipment investment consists of equipment, such as car-lifts and storage tanks, loaned to consumer accounts.

[4]Phillips TBA lube warehouse investment represents warehouse facilities only.

[5]The total net investment reflected in Exhibit C is a part of, and included in, the total investment figure of $1,518,696.00 reflected in Paragraph 17.

stations. The "Vanguard" label identifies the other ten which are operated as Phillips branded units. Seven (7) of the stations are leased under long term lease by Phillips from outside parties who own or lease the land and own the improvements. Phillips' net investment as to these is usually minimal because it normally involves only equipment. One station is located on leased land and is improved with service station improvements owned by Phillips. The remaining five (5) stations are leased by Phillips from a lessor with whom there is an agreement that Phillips must hold such party harmless from any loss on the investments. There is an additional $527,239.37 invested in these properties by such lessor. In all instances the investment figure is after deduction of depreciation.

EXHIBIT A

EXHIBIT A TWO

EXHIBIT B

	Phillips Co. Numbered S.S.						Other S.S.		Total
	Owned in fee			Leased					
	Dir. Dir.	Jobber	Total	Dir. Dir.	Jobber	Total	Dir. Dir.	Jobber	Total	
(EASTERN REGION)									
	170	155	325	720	1,325	2,045	355	5,690	6,045	8,415
(CENTRAL REGION)									
	108	196	304	557	1,472	2,029	167	3,714	3,881	6,214
(WESTERN REGION)									
	279	33	312	739	130	869	893	287	1,180	2,361
(TOTALS)									
	557	384	941	2,016	2,927	4,943	1,415	9,691	11,106	16,990

	Total Units	Phillips Operated	%Phillips Operated
EASTERN REGION:	8,415	284	3.27%
CENTRAL REGION:	6,214	309	4.97%
WESTERN REGION:	2,361	450	19.06%
TOTALS	16,990	1,043	6.14%

Summary by area:

EASTERN REGION:

Southeast Area (Alabama, Florida, Georgia, Mississippi, Southwest tip of North Carolina, small part on the Southwest side of South Carolina, Tennessee)

Total Units	Salaried Units	Percent
2,338	95	4.06%

Atlantic Coast Area (District of Columbia, Maryland, New Jersey, balance of North Carolina, Ohio, Pennsylvania, balance of South Carolina, Virginia, West Virginia)

Total Units	Salaried Units	Percent
2,966	123	4.15%

Midwest Area (Illinois, Indiana, Eastern one-fourth Iowa, Kentucky, Michigan, Eastern one-third Missouri, Eastern two-thirds Wisconsin)

Total Units	Salaried Units	Percent
?,111	66	2.12%

CENTRAL REGION:

Central Plains Area(Small piece Northwest Arkansas, Eastern two-thirds Kansas, Western two-thirds Missouri, Okalhoma except the Panhandle)

Total Units	Salaried Units	Percent
1,545	79	5.11%

Gulf Coast Area (Balance of Arkansas, Louisiana, Oklahoma Panhandle, Texas except El Paso)

Total Units	Salaried Units	Percent
2.061	72	3.49%

Rocky Mountain Area (Colorado, El Paso, Texas, Western one-third Kansas, Northwestern Minnesota, Montana, Western two-thirds Nebraska, New Mexico, North Dakota except Southeast corner, South Dakota except Southeast corner, part of Wyoming)

Total Units	Salaried Units	Percent
1,135	60	5.29%

Northern Plains Area (Western three-fourths Iowa, balance of Minnesota, Eastern one-third Nebraska, Western one-third Wisconsin)

Total Units	Salaried Units	Percent
1,473	98	6.65%

WESTERN REGION: (Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, balance of Wyoming)

Total Units	Salaried Units	Percent
2,361	450	19.06%

EXHIBIT C

SERVICE STATIONS IN MARYLAND

OPERATED WITH PHILLIPS PERSONNEL

NUMBER	LOCATION	TYPE	APPROXIMATE NET INVESTMENT
17003	Millersville, Md.	Private Brand Express	$ 12,265.01
17232	Edgewater, Md.	Vanguard	11,157.35
17803	Baltimore, Md.	Private Brand Express	12,386.83
17879	Bladensburg, Md.	"	9,283.50
18650	Lutherville, Md.	Vanguard	8,076.23
19071	Abingdon, Md.	"	13,859.20
19086	Millersville, Md.	"	7,492.64
20067	Baltimore, Md.	"	3,378.08
20211	Wheaton, Md.	"	11,923.41
20259	Baltimore, Md.	"	41,933.60
24022	Cockeysville, Md.	"	6,117.11
24603	Baltimore, Md.	"	23,366.74
25442	Baltimore, Md.	"	3,643.19
		TOTAL	$164,882.89

AFFIDAVIT

State of Georgia, County of Dekalb

R. A. Kurland, of lawful age, being by me first duly sworn according to law, deposes and says:

1. I am the General Sales Manager, Eastern Region, Marketing Division of Phillips Petroleum Company in Atlanta, Georgia. My home address is 3122 Belingham Drive, Northeast, Atlanta, Georgia 30345. My business address is 2220 Park Lake Drive, Northeast, P.O. Box 4833, Atlanta, Georgia 30302.

2. I have been continuously employed by Phillips Petroleum Company since September 9, 1946 on which day I came to work as a trainee in the Marketing Department. I had just completed work toward my Bachelor of Science degree at Oklahoma State University, Stillwater, Oklahoma. The various positions I have held with the company since my initial employment include: Warehouse employee; Personnel Clerk, Chemical Department; Marketing Department work in developing the anhydrous ammonia fertilizer distribution system; Assistant Division Manager, Fertilizer Sales, Denver, Colorado; Vice President and General Manager of Curry Chemical Company, a subsidiary of Phillips; Assistant Division Manager, Petroleum Products, Denver, Colorado; Senior Assistant Division Manager, Wichita, Kansas; Division Manager, Wichita and Memphis, Tennessee; Director of Marketing Research, Bartlesville, Oklahoma, Regional Manager, Southeastern Region; President, Phillips Films Company, a Phillips subsidiary; and General Sales Manager, Eastern Region Office,

Atlanta. I have held this last position since 1970. While with the company I have done graduate level work in the Stanford University Executive Program in the Graduate School of Business.

3. As General Sales Manager of the Eastern Region I am responsible to the Vice President of Marketing of Phillips for all marketing of refined petroleum products in the states which comprise the Eastern Region. These states are 19 in number and include all or parts of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. Also included is the District of Columbia. In all of the states of the Eastern Region Phillips is a wholesale supplier of gasolines, distillates, motor oils, greases, tires, batteries and accessories to its jobbers, its direct dealers and to some wholesale consumers. In most of these states Phillips also is a retailer of these same items by selling through its salary-operated stations. Maryland is within the Eastern Region and Phillips is both a wholesaler and a retailer in the State of Mayland.

4. Phillips markets its refined products in Maryland under its principal Phillips brands and also under a secondary brand known as Way-Lo. The trade names and brands of both Phillips and Way-Lo are appropriately registered in the State of Maryland.

5. During the entire period of my tenure as Eastern Region General Sales Manager Phillips has marketed in Maryland primarily by selling to jobbers or direct dealers, but it has operated a few of its service stations with its company employees. The great majority of our products is sold to jobbers with over 75 percent of our gasoline normally being sold to such jobbers nation-

wide, and 67 percent in Mayland. These jobbers within their sole discretion operate their stations with their own employees or contract with other independent businessmen to be dealers of Phillips refined products. Phillips has no control over the time or the manner in which any of these stations are placed in business or terminated from business. Phillips will not know from day to day how many of such jobber or jobber-dealer stations may be operating without taking a de facto count. In the day-to-day operations of the jobber-dealers, dealers to which Phillips sells direct, and jobbers, Phillips exercises no control. There are, of course, some provisions for control of quality of product and over use of Phillips-owned or Phillips-leased properties, but that is the extent of our control. We do try to offer suggestions for improvement of operations.

6. At the present time, Phillips markets its products in three regions, Eastern, Central and Western. At the end of 1974 the percentage of Phillips' salary operated stations in the Eastern Region was 3.27 percent, in the Central Region 4.97 percent and in the Western Region 19.06 percent for a national average of 6.14 percent. This percentage is expected to decrease appreciably in the immediate future when the presently pending sale of Phillips' marketing facilities in a large portion of its Western Region to The Oil Shale Corporation is finalized. The percentage of salaried operations in the Western Region has always been higher than in the balance of the country. This is due in part to the fact that Phillips is relatively new in marketing in a good portion of the Western Region, having come into that area as recently as 1966 by purchasing the marketing outlets of Tidewater Oil Company. Shortly after such acquisition, there were a large number of closings of

service stations due to the determination that they were unprofitable and due to the business decision by Phillips to upgrade the total marketing program in that area. In addition, the Western Region market is not a jobber oriented market, and Phillips has not been in the market place on the West Coast for an adequate length of time to be able to attract good dealers or jobbers in any large quantity. Consequently, Phillips made the business decision that a large number of the stations had to be operated by company employees in order for Phillips to be competitive in the market place. Phillips is of the opinion that this is a good example of why flexibility in marketing is necessary, to remain competitive and be responsive to the needs and demands of customers. In the State of Ohio, which is in the Eastern Region, 43 percent of Phillips total outlets are salary-operated stations. Again, Phillips was of the opinion that this was necessary in order to remain competitive with other marketers of petroleum products in that area.

7. Nationwide there were at the end of 1974 approximately 17,000 total retail outlets for Phillips products, of which number exactly 1,043 were salary-operated units, most selling Phillips principal brands only but a few selling secondary brands only. The ratio between these categories varies almost daily. These variances in methods of operation reflect Phillips efforts to maintain flexibility and meet the demands of the market. During recent years Phillips sales of branded products to jobbers have decreased and unbranded sales to jobbers have increased substantially.

9. As of June 30, 1975, there were 121 total retail outlets for Phillips brand products in the State of Maryland. Of these 3 sell Phillips' secondary brand,

Way-Lo, and these are not what would be called in the industry full-service stations. They provide no automotive service in the form of maintenance or repair. They sell only gasoline and add-on oil, and occasionally some minor accessory items which require no mechanical work and only limited, if any, installation work. The remaining 118 stations sell Phillips' principal brands. Phillips salary-operated principal brand stations are called "Vanguard" stations and provide all types of automotive service to their retail customers as well as having for sale a complete line of company petroleum products and tires, batteries, and accessories. Salaried personnel work in shifts, with varying hours of operation and under rather stringent controls by our company. These stations are intended as Phillips' "show places". Phillips endeavors to operate them in exemplary manner and provide the best service possible. They constitute part of Phillips' training program for its Marketing division. There are three detailed programs which are presented to all of Phillips' new service station employees. All of these stations are used to give on-the-job training. In addition, the Marketing trainees who are destined for jobs other than as service station attendants or managers undergo training at these stations. In addition to providing a ready source for Assistant Managers and Managers of the service stations, they also provide a source for potential Marketing division trainees and independent dealers. Moreover, Phillips' jobbers and occasionally its dealers will hire some of these driveway salesmen from Phillips for use in their businesses. We have found and are of the opinion that the personnel manning these stations receive excellent training to equip them to better serve the public. They are required to follow standard operating instructions and operating guidelines with

regard to day-to-day procedures involving all phases of the stations' operations, including customer service procedures, cleanliness standards, personal appearance and uniform standards, use of advertising displays, etc. Phillips cannot, of course, exercise such control over the day-to-day routine operations of its direct dealers, jobbers or jobber-dealers. Total volumes of motor fuel sales from these salary-operated stations in Maryland were 7,364,690 gallons for 1973 and 5,977,551 gallons for 1974. Of the 118 branded stations in Maryland 88 are jobber controlled, 14 are leased direct from Phillips to dealers, 6 are owned by dealers or leased by them from others, and 10 are Vanguard stations operated with Phillips employees. Most of Phillips' employees in Maryland are involved in operation of the salary-operated stations.

9. Only Phillips-produced and refined products are sold through the Phillips operated stations. Phillips branded products sold in Maryland are produced and refined outside the state and are brought to the state in interstate commerce, principally by pipeline for delivery into Phillips' segregated storage at the Amerada-Hess terminal at Baltimore. Some small amount comes by transport trucks from another state.

10. Operation by Phillips of a total of 13 service stations in Maryland with company personnel results in a percentage of such operation being approximately 10.7 percent of the total number of retail outlets for Phillips branded products in Maryland. This is at best an estimate of the percentage because of Phillips being unable to control the exact number of total outlets selling Phillips brand products at any given time, since jobbers may open additional stations selling Phillips branded products within their sole discretion and often

times without prior notice to Phillips. A comparison of percentages of such company operations in the 19 states which are within the Eastern Region of Marketing of Phillips reveals that such percentages range from zero in 5 states to a maximum of 43.3 percent in Ohio. These percentages in various states necessarily increase or decrease as Phillips concludes salary or, alternatively, dealer operations are best suited to remain competitive in the market place. Phillips marketing concept is based on the opinion that it must maintain a number of full-service service stations in any state in order to provide automotive services to the public other than sales of gasoline and oil.

11. There is no general trend or any present plans on the part of Phillips in Maryland for conversion of dealer units to company-operated units. Sometimes it is necessary that stations previously operated by Phillips' dealers be operated with salaried personnel if the station is to remain open when the dealer ceases to operate the station at a particular location with little or no notice. Examples of such situations include: termination of the lease by the dealer or Phillips; death; prolonged serious illness; bankruptcy; fraud and so forth. Also it often is essential that new service stations be operated with salaried personnel until the station builds up its trade to the point where its business will attract a good dealer and can result in his operation of the station at a profit to him. Of course, units previously operated by salaried personnel also are on occasion converted to jobber operations or direct dealer operations. In our opinion, the demands of the market place cause variances in the operation of these stations. Overall in Maryland from 1971 to the present time there has been a decrease in the number of service

stations operated by Phillips employees from a high of 26 in 1971 to the present total of 13 which has been consistent since 1973.

12. In our opinion, the effect of the enforcement of the Maryland statute would be to cause Phillips to have to decide which, if any, of the presently company-operated stations it would want to convert to jobber or direct dealer operation. Such decision making process could very well result in the closing of some of the stations by Phillips. Whether closed or converted to jobber or direct dealer units, a necessary result could be the termination of employment of some of the present service station managers and employees. Upon a conversion to jobber or dealer operation, the new operator might want to hire some of these employees. It is quite possible that the present Phillips employee-operators would not be able to become direct dealers in these stations because the necessary investment might very well be prohibitive. It is, of course, possible that all of the Phillips-operated stations could be converted to jobber or dealer units, but in our opinion it is highly probable that such might not be feasible, either because of inability to find persons with the capital necessary to invest in such an operation or because dealer operations would be too expensive, necessitating such increases in consumer prices in order to be profitable operations that the stations could not be competitive.

13. I believe that it is impossible to predict with certainty what enforcement of the statute would result in ultimately insofar as Phillips' overall operations in Maryland are concerned. Clearly the existence of the statute would cause Phillips to be extremely wary of further investments in marketing facilities in Maryland. In my opinion, further expansion would be virtually

precluded and substantial improvements to existing facilities might very well not be made. I believe the same effect, only to a lesser extent, might result to Phillips' jobbers. Furthermore, it is my opinion that the statute would virtually eliminate Phillips from the list of prospective purchasers of jobbers' businesses when any such jobbers decided to sell. I am also of the opinion that the immediate impact of the statute to the producers and the refiners would be to create an unhealthy marketing climate for retail of refined petroleum products in Maryland. This unhealthy climate would ultimately lead to consideration of whether a company would cut back its operations or even continue to market in the state. It is highly unlikely that Phillips would withdraw from marketing petroleum products in Maryland, but my responsibility as General Sales Manager of the Eastern Region would necessitate my reviewing this matter and making my recommendations to our Company management.

14. Based upon my experience and knowledge of retail marketing of refined petroleum products, it is my opinion that the ultimate effects of this statute upon consumers in Maryland would generally be bad. I believe it would result in deterioration of service available to the consumer; possible increases in prices to consumers; a stagnation of competition; an interruption of business continuity necessary for good service to the customer; termination of use of Company-operated stations for the training and better equipping of service station operators, both Company and independent dealer, and for introduction and perfection of innovations relating to service, merchandising, new equipment, and so forth. It is also my opinion that it could lead to diversion of product from the State of Maryland either with or without a Federal allocation program.

15. Although I believe this legislation was apparently designed to protect independent dealers it is my opinion that it will not result in such protection. It will not prevent other merchandisers from entering the market and competing with the independent dealers. I believe that existing Federal and state law affords ample protection of rights of dealers without the necessity of bringing into being a completely devastating limitation upon the major producers and refiners. To me it is too severe a limitation upon free enterprise. It is my opinion that if the statute is upheld the ultimate effect upon Phillips will be to completely alter its marketing concept for the state; an alternative plan of marketing would have to be developed. If the statute is upheld, Phillips and other producers and refiners will not be able to own and operate a single retail station within the State of Maryland located on property which they own and/or possess. This interference with retail marketing would, in my opinion, destroy flexibility in operation of service stations which is absolutely essential to the retention of a healthy competitive market place.

16. There are many business entities that sell petroleum products at retail in Maryland which are not affected, or would appear not to be affected, by the Maryland statute. Examples are department stores, various grocery stores and convenience stores. Also, the majority of private branders and independents of all sizes are not affected by the law because they are not producers and refiners; it affects only integrated major oil companies.

I HEREBY CERTIFY, that on this 29th day of Sept., 1975, before me, a Notary Public for the State and County aforesaid, personally appeared R. A. KURLAND, known to me (or satisfactorily proven to be) the person who made oath in due form of law that the matters set forth hereinabove are true and correct to the best of his knowledge, information and belief.

/s/ R. A. Kurland
/s/ Betty J. Daniel
Notary Public

My Commission Expires July 15, 1979.

APPENDIX F

Stipulation of Facts Particular to Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.

1. Petroleum Marketing Corporation is a Delaware Corporation qualified to do business in the State of Maryland ("PMC") and Commonwealth Oil Refining Company, Inc., is a Puerto Rico Corporation ("Commonwealth").

2. Commonwealth, a company organized in 1953, is directly engaged in the refining of petroleum products and, through subsidiary corporations and joint ventures, is engaged in the production of aromatics and other petrochemicals. These activities are carried on at a petroleum refinery and petrochemical complex located at Penuelas, Puerto Rico. Commonwealth has no plant or facilities in the State of Maryland.

3. All of Commonwealth's activities are related to petroleum and products derived from petroleum. Commonwealth is totally dependent, for its crude oil supplies, upon foreign sources.

4. Since 1970, Commonwealth has marketed gasoline, motor fuels and lubricants through PMC which (in June, 1975), was operating 123 retail gasoline stations, under the federally-registered trademark "SCOT", in the Middle Atlantic and Northeastern States.

5. PMC has been engaged in the sale of petroleum products at wholesale and retail in the State of Maryland since 1955. PMC makes retail sales of gasoline and other petroleum products in intrastate and interstate commerce through 20 gas-only outlets and one commissioned agent relationship (which sells gasoline at wholesale and retail), located in the State of Maryland, as indicated on the attached map (Attachment A); PMC employs 196 persons at its Maryland retail facilities.

6. PMC does not change or alter the molecular structure of the refined products that it distributes in any of its facilities, storage tanks or stations in the State of Maryland. The products that PMC handles and distributes either for itself or others, enter PMC facilities from its supplier, Commonwealth, and leave in their original form.

7. All "SCOT" retail facilities in the State of Maryland are company-owned and company-operated by PMC. PMC has traditionally attempted to sell gasoline and motor oils in Maryland at a price less than those generally charged by major oil companies. "SCOT" retail outlets do not provide services such as repairs, oil changes and greasing, available at most service stations. "SCOT" retail facilities do not sell tires, batteries or other accessories available at most service stations.

8. Beginning in April of 1970 when PMC was acquired by Commonwealth, it has purchased the major

quantity of the gasoline offered for retail sale at its 20 Maryland "SCOT" retail facilities from Commonwealth. In recent months, the price of gasoline purchased by PMC from Commonwealth has increased.

9. Commonwealth and PMC have only the stated business relationship with "SCOT" retail gasoline outlets in the State of Maryland; neither company has any dealership or franchised arrangement at any "SCOT" retail outlet.

APPENDIX G

Stipulation of Facts Relating Specifically To Ashland Oil, Inc.

1. Ashland Oil, Inc. ("Ashland") is a Kentucky corporation with its principal offices at P.O. Box 391, Ashland, Kentucky 41101.

2. Ashland Petroleum Company, is a wholly owned subsidiary of Ashland Oil, Inc., primarily engaged in the business of refining crude oil and the transportation and marketing of petroleum products. Ashland does engage in some exploration for, and production of, crude oil. However, Ashland's crude production (approximately 30,000 barrels per day in 1974) represents less than 15% of the crude oil which it refines daily in its refineries. Ashland purchases 85% of the crude oil used in its refineries from sources it neither owns nor controls.

3. Ashland has seven crude oil refineries with an aggregate refining capacity of approximately 385,000 barrels per day. These refineries are located in the

Eastern and Upper Midwestern regions of the United States: two are in Kentucky, two are in Ohio, one is in Minnesota, one is in New York and one is in Pennsylvania.

4. Ashland engages in no crude oil production and has no petroleum refineries within the State of Maryland. Ashland's operations in Maryland are limited to the supplying and marketing of petroleum products.

5. None of the petroleum products which Ashland supplies or markets in Maryland come from an Ashland refinery. All of the petroleum products sold in Maryland, either to an Ashland customer or through an Ashland owned filling station, are purchased from another oil company through exchange agreements. All of the petroleum products sold by Ashland at retail in Maryland are transported into Maryland in interstate commerce.

6. Ashland owns and operates with company personnel only 17 filling stations in Maryland, under trade names "Redhead," "Bi-lo," "Payless," and "Hi-Fi." Of these 17 stations, 7 are located in the Baltimore vicinity; the others are located in White Marsh, Aberdeen, Laurel, College Park, Cambridge, Cumberland, Adelphi, Suitland and Salisbury. These "gasoline-only" stations, either have no service or car wash bays, or have them sealed off. They do not sell tires, batteries, or accessories, and have no travel maps or other traveler aids. Ashland does not provide credit cards to these stations and engages in no advertising of the brands Redhead, Bi-Lo, Payless, or Hi-Fi.

7. Ashland does not market gasoline at retail in Maryland at any other facility other than those listed above. Ashland, *has never* sold gasoline in Maryland

through independent retailers known as "branded" dealers or "lessee" dealers. No gasoline is sold in Maryland under the "Ashland" brand. Ashland has owned and operated company-owned filling stations in Maryland continuously since 1961.

8. Ashland's investment in the above filling stations as of September 30, 1974, was $2,381,385.

9. The following table sets forth Ashland's volume of sales of gasoline in Maryland in gallons through its 17 filling stations during 1971, 1972, 1973 and 1974.

1971	20,255,934
1972	25,989,410
1973	30,498,150
1974	26,959,471

10. The normal hours of operation for Ashland's stations are 6:00 A.M. to 12:00 P.M. each day. Ashland employs approximately 220 persons in its marketing operations in Maryland.

11. In states other than Maryland, Ashland markets petroleum products through 699 company operated stations and 640 independent leased "dealer" stations. Of the company operated stations, 698 are gasoline only stations, of which 193 are self-service, and 1 is a conventional service station. Of the 640 dealer stations, none are gasoline only; all are conventional stations.

12. John Vernon, Association Administrator for Fuels Management, Office of Operations, Regulations and Compliance of the Federal Energy Administration, is called by Ashland as a witness in this proceeding, would testify to the facts set forth in his sworn affidavit (appended hereto as Exhibit A), as filed in the United States District Court for the District of New Jersey on July 31, 1975 in *Exxon v. FEA, et al.*, Civil

No. 75-150. Exhibit B hereto is a copy of an exhibit filed by the Federal Energy Administration in the action identified in paragraph 14 above.

Consented to by Counsel:

/s/ Fred W. Drogula
Ginsburg, Feldman and Bress
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Attorney for Ashland Oil, Inc.

/s/ John A. Woodstock
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Baltimore, Maryland 21202

Attorneys for Defendants

In the United States District Court
for the District of New Jersey

Civil Action No. 75-150

Exxon Corporation,
Plaintiff,

v.

Federal Energy Administration
and
Frank G. Zarb,
Defendants,

Ashland Oil Company,
Intervenor,

Independent Refiners Association
of America,
Intervenor.

CERTIFICATION OF VERNON AFFIDAVIT

I hereby certify that the attached copy of the Affidavit of John Vernon, dated January 21, 1975, which I understand is to be filed with this Court on August 1, 1975 in connection with the above-referenced litigation as Exhibit A to defendants' memorandum, is a true and correct copy of said Affidavit as originally signed by me in January 1975.

JOHN VERNON

Subscribed and sworn to before
me this 31st, day of July, 1975.

NOTARY PUBLIC

My commission expires:

EXHIBIT A

AFFIDAVIT OF JOHN VERNON

I, JOHN VERNON, being first duly sworn, on oath, depose and state as follows:

1. I am Associate Assistant Administrator for Fuels Management, Office of Operations, Regulations and Compliance of the Federal Energy Administration ("FEA"). Prior to joining FEA's predecessor agency, the Federal Energy Office ("FEO"), on February 25, 1974, I was associated with Creole Petroleum Corporation, a Delaware corporation affiliated with the Exxon Corporation and headquartered in Caracas, Venezuela. My last position at Creole was as Senior Advisor. I hold a Bachelor of Science degree in Chemical Engineering from Massachusetts Institute of Technology and a Master of Business Administration degree from Harvard University. I was an active participant in FEA's decision to implement the cost equalization program described below, and my office is responsible for the administration of that program.

I. The Emergency Petroleum Allocation Act of 1973 and Agency Regulations Relating to Crude Oil.

A. Requirements of the Emergency Petroleum Allocation Act

2. FEA is responsible for the development and implementation of a program for the mandatory allocation and pricing of crude oil, residual fuel oil and each refined petroleum product under the Emergency Petroleum Allocation Act of 1973 ("Allocation Act"), which became law on November 27, 1973. In Section 4(b)(1), Congress specified objectives which must be met, "to the maximum extent practicable," in any allocation program, including the following:

> "(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, non-branded independent marketers, and branded independent marketers;
>
> * * *
>
> "(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions of the United States and sectors of the petroleum industry, including independent refiners, small refiners, non-branded independent marketers, branded independent marketers, and among all users;
>
> * * *
>
> "(H) economic efficiency; and
>
> "(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms."

3. In Section 4(c)(1) of the Act, Congress required that the mandatory allocation program for crude oil shall, "to the extent practicable and consistent with the objectives of subsections (b) and (d)," result in the allocation of crude oil to each "small refiner" and each

"independent refiner" in an amount not less than the amount sold or otherwise supplied to such refiner during the corresponding period of 1972, adjusted to provide for the aggregate shortfall, if any, in total crude supplies under 1972 levels. The term "independent refiner" is defined in Section 3(3) of the Allocation Act as any refiner that obtains more than 70 percent of its refinery input from sources not subject to its control and which markets a substantial portion of its gasoline through independent marketers. The term "small refiner" is defined in Section 3(4) of the Allocation Act as any refiner whose total refinery capacity does not exceed 175,000 barrels per day.

B. FEA's [illegible] Regulatory Program Relating to Crude Oil

4. The principal components of the regulatory program, other than the cost equalization program at issue here, which have been devised by FEA to regulate the allocation and pricing of crude oil, are described briefly in the paragraphs below. Each of these programs is currently in effect and operates in conjunction with the cost equalization program.

(1) The Two-Tier Pricing System

5. Beginning in 1971, a series of "leapfrogging" settlements were entered into between members of the Organization of Petroleum Exporting Countries and the major international oil producers which rapidly increased the posted price of crude oil, each settlement being somewhat higher than the last and each driving up the price of crude oil in the world market, including the price of domestic crude oil. Then, during the Summer of 1973, the Organization of Petroleum Exporting Countries, by concerted action, raised their

oil prices substantially above previous levels. For at least the previous 10 years, the U.S. had grown increasingly reliant on foreign crude oil due largely to a leveling off of domestic production, and therefore the nation had no choice but to accept the 1973 price increases if current levels of supply were to be maintained. Thus, in August 1973, when the Cost of Living Council devised a system of price controls for the petroleum industry, it concluded that, while most domestically-produced crude oil had to be subjected to ceiling price controls to minimize as much as possible the inflationary impact of worldwide oil price increases, certain domestically-produced crude oil had to be exempted from ceiling prices to encourage domestic production over the long run.*

6. The solution was the "two-tier" price system for domestic crude oil, promulgated by the Council on August 19, 1973 as part of the Phase IV petroleum price regulations (6 C.F.R. § 150, Subpart L) and subsequently adopted on January 14, 1974 as Part 212, Subpart D of the FEO Mandatory Petroleum Allocation and Price Regulations. Briefly, under the two-tier pricing system, FEA imposes a ceiling price on domestic crude oil produced from a given property when production is at or below the level of production from the same property in the same month of 1972 (*i.e.*, "old" oil). This ceiling price is basically the May 15, 1973 posted price plus $1.35, or about $5.25 per barrel on the average.* Crude produced in excess of 1972

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*The first sale of imported crude was also exempted from ceiling prices because it was not possible to obtain sufficient imported supplies at a controlled price.

*More specifically, under Section 212.73 of FEA regulations, the ceiling price for a particular grade of domestic crude in a [footnote continued]

production levels from the same property (*i.e.*, "new" oil) is exempt from price controls, and each barrel of new oil produced releases from price controls a barrel of old oil (*i.e.*, "released" oil). Thus, for example, if a particular property produced 100 barrels per day in 1972 and 110 barrels per day in 1974, 90 barrels would have to be sold at the FEA-imposed ceiling price, and 20 barrels (10 barrels of "new" oil plus 10 barrels of "released" oil) could be sold at the free market price. Also exempted from price controls were (i) by Congress in the Allocation Act, the first sale of crude oil produced from "stripper" wells (*i.e.*, wells which produce less than 10 barrels per day) and, (ii) by FEA in its regulations, the first sale into U.S. Commerce of imported crude oil.

7. Crude oil prices are significant not only at the producer level, but also at the refiner level and at the marketing level (*i.e.*, the resellers of refined petroleum products), since FEA regulations permit refiners and resellers to *pass through* increased crude oil costs in the sale of refined products. Under the price rules, a refiner may charge no more than its May 15, 1973 price on a given product plus an adjustment for net increases (over May 1973) in the cost of crude oil (foreign and domestic) and purchased refined products. Basically, a refiner's prices will reflect its average weighted crude oil costs plus its May 15 profit margin or markup. While May 15 profit margins may vary slightly from firm to firm, the largest contributor to varying lawful prices charged by refiners is the difference in average weighted

particular field is (i) the highest posted price for that grade of crude at that field on May 15, 1973 or, in the absence of such a price, the posted price for comparable crude at the nearest field on that date, plus (ii) a maximum of $1.35 per barrel.

crude costs attributable to the operation of the two-tier pricing system. These different lawful prices are passed on at the wholesaler and retailer level as such resellers are required to remain within their May 15, 1973 markup on products, while passing through any increased product costs from their suppliers.*

(2) The December 1 Rule — Section 211.63(a)

8. The imposition of the Arab oil embargo in October 1973 and the sharp increases in the posted prices of foreign crude oil greatly intensified the demand for price-controlled domestic crude oil during the Fall of 1973. Shifting of normal supplier/purchaser relationships was occuring during December 1973 in anticipation of the new regulatory program required by the Allocation Act of November 27, 1973, which many refiners assumed would result in a freeze of contractual relationships between suppliers and purchasers, but not before the end of 1973. In response to these considerations, FEA adopted the so-called "December 1" rule of §211.63(a), which provides in substance that supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973 shall remain in effect for the duration of the crude oil allocation program. While the December 1 rule freezes supplier/purchaser relationships and maintains essential supply channels, the rule was not designed to and does not achieve a full

*FEA's price regulations carry out the provisions of Section 4(b)(2) of the Allocation Act, which provide that in specifying prices for allocated products (or in prescribing the manner for determining them), FEA must use a single date in computing the base prices at all levels of marketing and distribution and FEA must permit a "dollar-for-dollar pass through" of net increased product costs to all marketers and distributors at the retail level.

and *equitable* allocation of price-controlled old oil, the goal FEA's cost equalization program is intended to achieve.

(3) The Crude Oil Mandatory Sales ("Buy/Sell") Program

9. Another major element in FEA's crude oil regulatory program is the Mandatory Crude Oil Sales Program set forth in 10 C.F.R. §211.65. The purpose of this program is to correct the supply imbalances between the major integrated refiners on the one hand – which have relatively greater direct control over both domestic and foreign crude oil production – and the small and independent refiners on the other – which had been dependent upon foreign crude oil or upon domestic crude oil delivered by the majors which, in turn, replaced it with relatively inexpensive foreign crude oil. Furthermore, because of the increasing price disparity between foreign and domestic crude oil, the buy/sell program was also designed as a pricing mechanism by which small and independent refiners would be given *some* access to the benefits of price-controlled domestic crude oil. Thus, the buy/sell program has served both a supply and a pricing function. As described below, the program's supply objective is to assure each small and independent refiner preferential allocations so that they may obtain volumes not less than the volumes they had in 1972. See Allocation Act, Section 4(c)(1). With respect to price considerations, buy/sell program sales are basically made at a refiner-seller's weighted average price (with certain adjustments), thereby giving small and independent refiners some access to the benefits of price-controlled oil and ameliorating, to some extent, the overall price inequities that would otherwise prevail as a result of

uneven distribution of price-controlled crude oil among refiners.

10. Under the buy/sell program, each "small refiner" and "independent refiner" (as those terms are defined in Sections 3(3) and 3(4) of the Act, respectively) is entitled to purchase in each three-month allocation quarter an amount of crude oil equal to the difference between (1) one-quarter of the crude oil it refined (*i.e.*, its "runs to stills" or "crude runs") during the year 1972 and (2) the volume of its runs to stills during the period February through April 1974 (without regard to buy/sell purchases or sales by the refiner during that period), subject to certain adjustments not pertinent here. Purchases by small and independent refiners, called "refiner-buyers," are made from the 15 U.S. refiners which are neither "small" nor "independent" within the meaning of the Allocation Act. This group, called "refiner-sellers," includes the 15 largest integrated oil companies in the United States, except for several firms classified as independent refiners by reason of their relatively small amount of controlled production. Each refiner-seller's share of the total sales obligation under the buy/sell list is fixed; it is the ratio of each refiner-seller's refinery capacity to that of the total refinery capacity of all 15 refiner-sellers as of January 1, 1973.

11. FEA's special pricing rules governing allocation sales of crude oil under the buy/sell program, 10 C.F.R. §212.94, provide that a refiner-seller may charge the weighted average price of all crude oil delivered to it in the area of the country where the sale is made in the month in which the sale is made. The seller may also add to the price a "handling fee" of 30 cents per barrel and may adjust the price to take into account the fact

that the crude oil sold may be of a higher or lower grade than the seller's average grade. Further adjustment may be made, if necessary, to shift to the buyer transportation costs associated with the sale. The program also allows a refiner-seller to pass through on a dollar-for-dollar basis in its prices for refined petroleum products any increased costs related to replacing allocated crude with higher-priced, foreign crude oil. 10 C.F.R. §211.83(c). Therefore, a refiner-seller is permitted by FEA's pricing rules to recover fully the product and non-product costs associated with sales made under the program.

II. *The Cost Equalization Program.*

12. The newest component in FEA's regulatory program concerning crude oil is its Cost Equalization Program, 39 F.R. 42246 (December 4, 1974), the development and specifics of which are described in the paragraphs that follow.

A. Introduction

13. As previously noted, not all crude oil refined in the United States is subject to FEA's ceiling price regulations. Imported, new, released and stripper well oil, constituting approximately 60 percent of all crude oil runs to stills in domestic refineries, is priced at essentially the world market, while the balance, old oil, representing approximately 40 percent of all crude runs domestically, is subject to the ceiling price regulations. However, because of the two-tier pricing system and the dramatic price increases of foreign crude oil over the

last year, as a result of the Arab oil embargo and concerted action taken by the Organization of Petroleum Exporting Countries, a substantial difference has developed between the average price of domestic old oil and free or world market prices of crude oil.

14. When the Cost of Living Council imposed controls on old domestic crude oil in August 1973, the per barrel price was set at May 14, 1973 posted prices plus $.35, which resulted in an average price of approximately $4.25, and remained there until the price was raised $1.00 to the current level of approximately $5.25 per barrel on December 19, 1973. During this same period, however, posted prices on representative foreign crude oil (Arabian light crude) increased over eight dollars per barrel, from approximately $3.07 per barrel in August 1973 to approximately $11.65 in January 1974. The increase in foreign crude prices has also increased domestic prices on new, released and stripper well oil to a current price in excess of $10.00 per barrel, as compared with an August 1973 price of around $5.00.

15. With the growing differential between the ceiling price for old oil and free market prices for stripper, new, released and imported oil, the uneven distribution of old oil among all refiners (particularly as it affected certain small and independent refiners) began to show up in significant price differences among such refiners in sales of refined products. Since refiners' prices on refined products are a function of their May 15, 1973 prices plus their increased crude oil costs, these price differentials were directly attributable to the different proportions of old oil which such refiners used to

compute their overall increased crude oil costs.* Furthermore, price differentials among refiners were, of course, thereafter translated into price differentials at wholesale and retail levels as independent marketers passed through their increased product costs on a dollar-for-dollar basis.*

16. During the shortages of last Winter and Spring, these price differentials were passed through to the ultimate consumer with the anamolous result of purchasers paying significantly different prices for the same product. With the relaxation of the severe, worldwide supply shortage, following the termination of the Arab oil embargo, price competition began to reemerge for certain products. While the differences in refiners' average crude oil costs remained, competition in the marketing of refined products caused the differences in retail prices to be narrowed.

17. To meet competition, however, many refiners and marketers (with higher input costs) had to endure a severe cost-price squeeze. Many small and independent refiners and independent marketers—unable to absorb

*As shown in Attachment A hereto, a graph of refiner crude costs, the price disparity caused by the two-tier pricing system has created a considerable range of crude oil costs. For example, in May 1973, prior to the implementation of the two-tier system, the average composite crude cost for major integrated refiners was approximately $3.82 per barrel, while the average cost for small and independent refiners was about $3.91. A considerable disparity in average composite crude costs, however, had developed by July 1974: the average composite crude cost for major integrated refiners was around $9.08 per barrel; the average cost for small and independent refiners was about $9.96. This disparity, although now slightly reduced by sales under the buy/sell list, is nevertheless still significant.

*An "independent marketer" is a person who is not a refiner and who is engaged in the marketing or distributing of refined petroleum products/ See Allocation Act, §3(1)(2).

the full amount of such costs—were required to charge higher prices for their products with a consequential loss of market shares. The adverse effects of increased costs were felt especially at the marketing level. In many cases, high-cost, independent and small refiners were supplying their marketers at roughly the same cost as the retail-prices of major branded marketers. The inevitable result for many marketers was a drastic reduction in sales volume or continued operations at a loss.

18. In short, the two-tier crude oil pricing structure, which was deemed necessary to minimize the inflationary impact of world crude oil prices and to maintain incentives for domestic production, created economic distortions and interfered with market mechanisms because of the uneven distribution of old crude oil among domestic refiners. Moreover, since independent marketers and many small and independent refiners were disadvantaged by this development, the distortion threatened the competitive viability of the independent sector of the petroleum industry.

19. As previously noted, FEA's December 1 rule and buy/sell program did not offer a complete solution to the conditions which had developed. FEA's December 1 rule had been only partially successful in addressing the problem of unequal crude oil input cost to refiners. By freezing all crude oil supplier/purchaser relationships as of December 1, FEA prevented further moves by the major integrated refiners to divert crude oil, including low-cost old oil, to their own refineries. The December 1 "freeze," however, did not assure the equitable allocation of old oil. The price rules governing sales made to comply with the mandatory crude oil allocation program—the buy/sell program—had a modest

cost equalization effect on the small and independent refiners benefiting from that program. That cost equalization effect, however, was insufficient, since that program was principally designed to assure adequate supplies and the firms entitled to purchase the highest volumes of crude oil under that program were not necessarily the ones suffering the most from a lack of access to low-cost old oil.*

20. FEA was thus confronted with conditions which ran contrary to various objectives of the Allocation Act. With the relaxation of the worldwide shortage, an uneven distribution of old oil (which, given demand, is and will remain in short supply) began to produce economic distortions which, contrary to the Allocation Act, interfered with the normal (and desirable) operation of market mechanisms, *i.e.*, price competition. Section 4(b)(1)(I). Further, the price differentials encountered at all levels of the distribution chain ran counter to the statutory objective of equitable allocation of refined products at equitable prices among all regions of the U.S., all sectors of the petroleum industry and among all users. Section 4(b)(1)(F). Finally, the impact of these developments on independent marketers and many small and

*Although there are comparative surpluses of crude oil on the world market and the cost equalization program (which in large part supplants the cost equalizing function of the buy/sell program) has now been adopted, there are still important reasons for retaining the buy/sell program. First; as described below, entitlements are issued based on volumes of crude runs, and small and independent refiners need a regulatory guarantee of purchases under the buy/sell list to maintain run levels. Second, a significant number of small and independent refiners, due to their location or other factors, are physically unable to receive crude supplies in the world market and must rely on their rights to purchase crude oil under the buy/sell program.

independent refiners ran counter to FEA's special mandate to protect the competitive viability of these components of the petroleum industry. Section 4(b)(1)(D).

21. For all of these reasons, FEA felt compelled to take action to correct the consequences of the inequitable allocation of old oil. The objective was clear – to assure equal access to the benefits of low-cost, domestic crude oil so that all refiners and all marketers would have roughly comparable input costs.* Input costs were comparable in the petroleum industry prior to the rapid rise in world oil prices and that situation would have continued *but for* FEA's mandate to regulate prices on domestic crude oil and the resulting two-tier pricing system.

22. To accomplish this goal, FEA could have simply allocated old crude oil equitably among all refiners and required the actual transfer of voluminous amounts of old oil. This approach, however, would have entailed enormous administrative burdens, both to the government and to the industry. As such, the scheme was rejected as contrary to the statutory goal of economic efficiency. Section 4(b)(1)(H). Instead, FEA devised a means of achieving the equitable allocation of old oil through the issuance of "entitlements".*

*Or stated another way, the objective was to insure that all refiners and marketers *shared equally* in the benefits of price-controlled oil *and* the burdens of free market price oil.

*FEA's decision, moreover, takes into account the fact that even if FEA had required a system of physical allocation of old oil among all refiners, under FEA regulations, refiners probably would have undertaken "exchanges" in order to minimize unnecessary movements of oil. For example, a refiner with more than its share of old oil (*i.e.*, a "refiner-seller" who would be

[footnote continued]

23. Under FEA's cost equalization program, in order for a refiner to keep barrels of old oil in excess of its proportionate share of old oil, it must purchase an "entitlement" from a refiner who has less than its proportionate share of old oil. To effectuate this system, FEA issues each refiner enough entitlements to refine the same proportionate share of old oil as any other refiner. A refiner with more than its share of old oil will have to buy entitlements to cover those extra barrels of old oil; a refiner with less than its share will have excess entitlements which it can sell. In this manner, all refiners share equally in the benefits of the two-tier pricing system.

24. The results of buying and selling entitlements are precisely the same as if old oil were physically allocated among all refiners; namely, refiners will have roughly equal average weighted crude oil costs. This is accomplished by treating the cost of an entitlement a

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required to sell old oil to a refiner with less than its share) probably would have swapped such old oil for a refiner-buyer's new, released, stripper or imported oil rather than transship the old oil and purchase other crude oil to replace it. The refiner-seller would charge approximately $5.25 for each barrel of old oil required to be sold and would have to pay roughly $10.25 for each barrel of new, released, stripper or imported oil acquired in the exchange. However, since neither refiner would, in all likelihood, want to transship physically the oil, they could "net out" the transaction and the refiner-seller would pay $5.00 per barrel (the difference between the two prices) to the refiner-buyer for the right or "entitlement" to keep the price-controlled old oil at its refinery. If all refiners engaged in such swaps and accounted for the old oil that was required to be sold as a paper transaction, the result would be the same as an actual physical allocation of old oil. Similarly, the entitlements program, as devised, fully recognizes these practical considerations and achieves the end results of physical allocation without actually requiring unnecessarily burdensome physical transshipments.

refiner purchases as part of its crude oil costs and by requiring the proceeds from the sale of an entitlement to be offset against the crude oil costs of the refiner selling the entitlement. Through this mechanism, FEA is able to minimize the economic distortion caused by the two-tier pricing system by distributing equitably to all refiners the benefits created by FEA's price controls on old oil. In other words, FEA's cost equalization program does no more than insure that certain elements of the petroleum industry are not given an undue competitive advantage *solely* because of the two-tier pricing system.

25. Furthermore, the effects of cost equalization at the refiner level will, of course, filter down the distribution chain to wholesalers and retailers, thereby minimizing adverse, downstream effects on marketers of petroleum products and preserving the competitive viability of independent marketers. Inequitable price differentials to consumers in the same or different regions of the country will also be eliminated. Accordingly, the market mechanism of price competition can operate without the distortions produced by inequitable distribution of low-cost product among the various sectors of the industry.

26. To make this cost equalization program work and to be consistent with its overall purpose and rationale, FEA concluded that it was also necessary to issue entitlements to certain importers of refined petroleum products. Basically, FEA concluded that it would be inequitable to address the problem of disproportionately high product costs to independent marketers who buy from domestic refiners dependent upon foreign crude oil and to ignore the plight of independent marketers who purchase finished products

from foreign or offshore refineries. For FEA felt that Congress was no less concerned with the competitive viability of this latter group of independent marketers. See Allocation Act, § 4(b)(1)(D). Further, the goal of insuring the sale of refined products at equitable prices among all regions would not have been met by a cost equalization program which ignored the fact that certain regions are more heavily dependent than others on imports of finished products. Accordingly, FEA's cost equalization program was designed, "to the maximum extent practicable," to provide all refiners and independent marketers (regardless of their source of supply) an equitable share of the benefits of price-controlled, old oil.

B. Rulemaking Proceeding.

27. FEA initiated its expansive, three-month rulemaking proceeding concerning the allocation of old oil with a notice issued August 28, 1974, 39 F.R. 31650 (August 30, 1974). The notice of proposed rulemaking, Attachment B, contained the principal proposal and four alternatives, on all of which comments were requested.*

28. Following the publication of the August 28, 1974 notice in the *Federal Register*, the agency received

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*In addition to the main proposal and the four alternative proposals, the August 28 notice also requested comments on several issues relating to the principal proposal. These issues included: basing entitlement issuances on refinery runs rather than capacity; special provisions for processing agreements for non-refiners; criteria that could be utilized to determine if a refiner was operating at reduced levels due to entitlements sales; the desirability of providing for a weighted entitlement distribution in favor of small refiners; and not requiring the participation of refiners with old oil supply-to-capacity ratios within a specified percentage range.

over 600 written comments from interested parties, and public hearings were held on September 24 and 25, 1974, at which statements were presented by over 40 interested parties. After carefully considering the contents of all written comments received and testimony presented, FEA significantly modified its original proposal and, on November 7, 1974, issued a further notice of proposed rulemaking. 39 F.R. 39740 (November 11, 1974). The further notice of proposed rulemaking, Attachment C, contained a proposal which substantially followed the form of the principal August 28, 1974 proposal, but with at least three significant modifications.

– A provision was added making a defined class of marketers historically reliant on certain imported finished products eligible to receive entitlements for imported residual fuel oil, home heating oil and No. 2-D diesel fuel. For each month, importers were to be issued that number of entitlements whose value equaled the difference between the weighted average cost of the imported product and the weighted average cost of the domestic product.

– The August 28, 1974 proposal had specified that entitlement calculations would be based upon each refiner's total current refinery capacity, but invited comment as to whether the volume of a refiner's crude oil runs to stills (*i.e.*, barrels of crude oil actually refined) should instead be used as the basis for entitlement calculations. After receipt of numerous comments on this issue, FEA, in the November 7, 1974 further notice, proposed utilizing crude oil runs to stills as the basis for issuance of entitlements.

– The August 28, 1974 proposal also solicited comments on alternative provisions for a weighting in the calculation of the amount of entitlements to be distributed to small refiners. The small refiner "bias" provided for in the November 7, 1974 further notice was based on the sliding scale used in determining the issuance of oil import tickets under the Oil Import Regulations. Thus, in addition to receiving entitlements under the general provisions of the program, small refiners with daily average volumes of crude oil runs to stills of less than 175,000 barrels were to receive a percentage of entitlements that increased in inverse proportion to their volume of crude runs to stills.

29. Over 175 comments were received by FEA with respect to the further notice of rulemaking. After carefully considering the contents of the written comments received, FEA, on November 29, 1974, issued and adopted the final rule for the allocation of old oil. Attachment D, 39 F.R. 42246 (December 4, 1974). The final rule revised the November 7 notice in two respects. First the small refiner "bias" contained in the November 7 notice was determined to be insufficient to ensure the competitive viability of small refiners. Thus, the final rule provides for an increased bias by making it equivalent to the maximum economic preference historically received by small refiners under the Oil Import Regulations. Second, the final rule modified the basis on which entitlements are issuable to importers of residual fuel oil and home heating oil. FEA determined that importers of residual fuel oil should receive entitlements on the same basis as imports of home heating oil, and that a fixed fractional entitlement value per barrel of imports should be established. See paragraph 35 below.

30. Since the issuance of the final rule, FEA has taken two substantive actions relating to the old oil allocation program. First, pursuant to 10 C.F.R. § 211.67(i)(4), the agency set the value of an entitlement at $5.00 for the month of November 1974, the first base month to which the cost equalization program applies. 39 F.R. 43103 (December 10, 1974). The other action taken by FEA was to amend the November 29, 1974 rule, on an emergency basis, so as to allow those small refiners which, because of relatively high-level old oil runs, would be *buyers* of entitlements to phase into the program over a three-month period. Attachment E, 39 F.R. 43814 (December 19, 1974).*

C. Principal Features of the Cost Equalization Program

31. As earlier described, FEA devised a means for achieving the equitable allocation of the old oil through the issuance of entitlements rather than through the physical allocation of voluminous amounts of old oil. FEA's program provides that each refiner will be issued that number of "entitlements" for each month equal to that refiner's proportionate share of old oil in the U.S., adjusted upward if the refiner is a beneficiary of the small refiner bias. Additionally, a limited number of eligible firms (including refiners) which import residual fuel oil and home heating oil (which includes No. 2-D diesel fuel) are issued entitlements based on the volume of such products imported. An "entitlement" is defined as the right of a refiner owning the entitlement to include one barrel of old oil in its adjusted crude oil

*On December 20, 1974, FEA also issued certain corrective and technical amendments to the cost equalization program, concerning the small refiner bias and the treatment of buy/sell sales. 39 F.R. 44710 (December 27, 1973).

receipts in a particular month.* Because the old oil allocation program is designed to remove inequitable conditions caused by the two-tier pricing system, the price of an entitlement has been set by FEA, with reference to the differential between controlled and uncontrolled crude oil prices, at $5.00. A refiner having a greater volume of old oil in its adjusted receipts than the volume permitted by entitlements issued to it is required to purchase, from a refiner or eligible firm that has entitlements available for sale, a sufficient number of entitlements to cover the excess.

32. *Refiner Entitlements.* The number of entitlements that a refiner receives is based on its percentage of old oil to its total crude oil runs to stills. 10 C.F.R. § 211.67(a)(1). The use of crude runs and the rejection of the use of refining capacity as a basis for entitlement calculations reflects FEA's recognition that utilization of refining capacity would result in less effective cost equalization relative to product output than use of crude runs to stills. Furthermore, the use of crude runs encourages full utilization of domestic refinery capacity, while the use of refining capacity would have provided an incentive to maintain idle, inefficient capacity. Substantial administrative problems concerning enforcement of minimum operating levels for refiners would also have been encountered under a capacity-based program.

*Refiners must differentiate between old, new and released oil for billing purposes, and billings often arrive late and are subject to further adjustments. Under the cost equalization program, such billings which have the effect of correcting the amounts of old oil run by a refiner in a prior month (not including months prior to the beginning of the program) are reflected in adjustments to the current month's receipts, in order that the program can remain current even if billings are not. (See definition of "adjusted crude oil receipts." 10 C.F.R. §211.62.)

33. In order to determine the precise number of entitlements issuable to a refiner, *i.e.*, a refiner's equitable share of the total volume of old oil received into inventories in a given month, a computation is made for each month to establish the "adjusted national old oil supply ratio," *i.e.*, the volume of old oil included in the aggregate crude oil receipts for all refiners, expressed as a percentage of the total volume of the crude oil runs to stills for all refiners for that month. For example, if the total number of barrels of old oil was 200 million and the total number of crude runs is 500 million, the old oil supply ratio is 2/5 or 40 percent. Thus, if all old oil were equitably allocated among all domestic refiners, each refiner would run 40 percent old oil. Since small refiners and importers of certain imported products (including refiners) will be issued entitlements in addition to those to be received on the basis of crude run levels, the total volume of old oil used to calculate the national ratio of old oil runs must be reduced by the number of entitlements so provided. Therefore, in the aforementioned example, the ratio would be determined as follows:

$$\frac{200 \text{ million} - x - y}{500 \text{ million}}$$

where x is the number of additional entitlements given to small refiners pursuant to the small refiner bias, and y is the number of entitlements given to eligible firms for imported products. Having established an adjusted national old oil supply ratio, that ratio is applied to each refiner's crude runs and each refiner receives entitlements for that percentage of its crude runs.

34. *Small Refiner Bias.* In addition to the number of entitlements it might otherwise receive as a refiner, a

small refiner (*i.e.*, having a refinery capacity of less than 175,000 barrels per day) has, as noted, an additional "bias" weighted in its favor. The amount of the bias, which on a percentage basis becomes greater as crude oil runs to stills become smaller, was intended to be at least equal to the dollar value (with an inflation adjustment) of the highest preference afforded small refiners under the Oil Import Program during that period when oil import tickets were selling above one dollar. This bias recognizes (i) the historical position of small refiners, (ii) the relatively higher operating costs and capital expenditures of small refiners and (iii) the fact that such small refiners in many cases must market (and traditionally have marketed) their products at a lower price than the products of the major branded refiners. Accordingly, in order to help preserve the competitive viability of this class of refiners, the program provides that refiners with a daily average volume of crude oil runs to stills of less than 175,000 barrels for a particular month shall be issued additional entitlements for each day of that month equal to an applicable percentage of that average daily volume. That percentage varies with the daily average volumes of small refiners' crude runs to stills for that month, up to 12.38 percent of daily average volume for refiners with a daily average volume of less than 10,000 barrels. 10 C.F.R. § 211.67(e).

35. *Importer Entitlements.* The decision to include a limited number of product importers in the class of persons eligible to receive entitlements was made in recognition of the Allocation Act's objectives of preserving the competitive viability of independent marketers and assuring the equitable distribution of refined products at equitable prices among all regions

and areas of the United States. Section 4(b)(1)(D), (F). Since a cost equalization program at the refinery level would not place marketers dependent on certain higher-priced, imported finished products in a competitive posture and since it would be unfair to equalize input costs for independent marketers dependent upon domestically-refined products, but not for independent marketers dependent upon foreign-produced products, FEA designed its cost equalization program so that marketers reliant upon certain imported finished products would be eligible to receive entitlements for their imports and could sell entitlements to refiners that need them.

36. Persons eligible for entitlement issuances are certain importers of residual fuel oil and No. 2 heating oil (which includes No. 2-D diesel fuel) referred to as "eligible firms." FEA regulations define an "eligible firm" so as to include only that well-defined group of historical marketers of such imported products. See 10 C.F.R. § 211.62. The "eligible products" were singled out for inclusion because they account for the major portion of finished product imports into the United States. The East Coast in particular is substantially dependent on imports of these products. Additionally, because of the volume of these products imported, they possess the greatest potential for significant adverse economic impact when import prices rise above prevailing domestic prices in the event of unexpected demand increases or supply shortages. Imports of other finished and unfinished products, on the other hand, are not as significant in the overall domestic market for petroleum products, and it was determined that inclusion of such products in the program would pose substantial administrative burdens and technical prob-

lems. Moreover, it was feared that inclusion of more products than necessary would create an undue incentive to import products and would operate as a disincentive to utilize and expand domestic refining capacity.

37. The rules for the issuance of entitlements to importers of No. 2 heating oil and residual fuel oil are as follow:

a. *No. 2 Heating Oil.* After considering the use of a system that would premise the issuance of entitlements upon the then prevailing differential between domestic and imported prices for the product on a weighted average basis across the nation, FEA concluded that such a system would be administratively infeasible. Difficulties in calculating this differential, given the variations in sulphur content as well as transportation differentials, make such a system unworkable. Moreover, since refiners sell at various prices to different classes of purchasers, FEA would have had to devise a system for obtaining a valid representative domestic price for comparison with the landed cost of imports. FEA thus determined that use of a fixed fractional entitlement value per barrel of imported heating oil offered an equally effective and administratively more feasible method for achieving the goal of protecting the competitive viability of independent marketers. Using current market differentials between imported and domestic heating oil, FEA concluded that a barrel of imported heating oil should be treated as equivalent to 30 percent of a barrel of crude oil included in a refiner's runs to stills. Thus, for every barrel of imported oil an eligible firm imports, entitlements will be issued with a value equivalent to .3 of the value of an entitlement

issued on a barrel of crude oil in a refiner's runs for the month concerned. For example, if the adjusted national old oil supply ratio were 40 percent and the value of an entitlement were $5.00, each refiner would receive .4 of an entitlement ($2.00) for each barrel of crude oil included in its crude runs, and each barrel of imported product would receive .3 of this entitlement value, or approximately .12 ($.60) of an entitlement. It is estimated that entitlements will translate into a value of approximately 1-1/2 cents per gallon for imports of heating oil.

b. *Residual Fuel Oil.* FEA concluded that imports of residual fuel should receive entitlements on the same basis as those of No. 2 heating oil. This approach minimizes economic distortion since heating oil is a major component in refinery blending of currently refined low sulfur residual fuel oils and has many of the same uses as residual fuel oil. Thus, the issuance of entitlements on the same basis to each category of imports will prevent undesirable shifts to middle distillate (heating oil) imports from residual fuel oil imports. See Allocation Act, § 4(b)(1)(I). Furthermore, because residual fuel users in many areas of the country must depend exclusively on imported product, failure to give them entitlements would mean they would not share proportionally in the benefits of the old oil allocation program, which otherwise would tend to equalize crude costs of domestic refiners. Finally, because the overwhelming majority of the residual fuel consumed in the United States is imported, the price of residual fuel oil consumed in the United States has been determined, for all practical purposes, by the landed cost of imports of this product. As a result, not only has the price of residual fuel oil moved above

its historical relationship to the price of other domestically-refined petroleum products, but consumers of residual fuel oil have been effectively precluded from participating in the benefits of FEA price controls on producer sales of domestic crude petroleum. Accordingly, FEA has taken steps to provide some degree of equalization with respect to imports of residual fuel oil, as it does with middle distillates, in order to insure equitable allocation of residual fuel oil at equitable prices among all regions of the United States, among all sectors of the petroleum industry and among all users. See Allocation Act, § 4(b)(1)(F).

38. *Entitlements Phase-In for Small Refiners.* As previously noted, subsequent to the issuance of the final regulation for the program, FEA concluded that a special provision was necessary to assist those small refiners required to purchase entitlements under the program to adjust on a graduated basis to their entitlement purchase obligations. In so doing, FEA recognized that the immediate imposition of the full entitlement purchase requirement could have a severe, short-term economic impact on certain of these small refiners and that such refiners would require a period of time to arrange necessary financing and to structure their marketing operations so as to minimize potential cash flow problems. This special provision, which was issued in the form of an emergency rule, provides that a small refiner, as to the first 30,000 barrels per day of its crude runs, does not have to purchase any entitlements for November, has to purchase only one-third the number it would otherwise have to purchase for December and has to purchase only two-thirds the amount that would otherwise be required for January 1975. For February 1975 and subsequent

months, small refiners will be required to meet their full purchase obligations.

39. *The Price of Entitlements.* FEA's entitlement program was devised to overcome the market distortions caused by the two-tier pricing system. Therefore, FEA elected to fix the price of entitlements on a monthly basis with reference to the differential between controlled prices of old oil and market prices of uncontrolled oil during the base month for which the price is set. The price for each entitlement to be transferred in January 1975, based on crude oil data for the month of November 1974, is $5.00 39 F.R. 43103 (December 10, 1974). The notice establishing the $5 price described why a price slightly less than the differential between controlled and uncontrolled prices was chosen:

> "Data available to FEA suggests that the differential between the weighted average price of old oil on the one hand, and new, released, imported and stripper well oil, on the other, is currently about $6. Because this is an estimate comparing averages, however, and because the prices actually being paid by refiners for both old and new oil vary considerably above and below the weighted averages, FEA has determined that $5 is an appropriate initial entitlement price. FEA believes that entitlement sales at this figure will substantially improve the competitive position of those refiners and marketers relying heavily on high-cost crude, while at the same time minimizing the possibility of overequalization, with its resultant inequity and economic distortion." *Id.*

40. FEA rejected the idea of letting the price of entitlements be negotiated because it foresaw the possibility of desperation pruchases or sales at un-

realistically high or low prices. Additionally, only eligible firms and refiners are allowed to purchase or sell entitlements, thereby eliminating the possibility that dealers or other middlemen will be encouraged to trade in entitlements. 10 C.F.R. § 211.67(i)(3)(i). To avoid hoarding of entitlements, the regulations require all excess entitlements to be sold, § 211.67(c), and FEA retains the authority to direct sales from a refiner or firm having such an excess to a refiner which has old oil receipts in excess of its entitlements. § 211.67(j).*

41. Finally, since the entitlement program is designed to effect a redistribution of costs, as alluded to earlier, all funds expended or received as a result of the purchase or sale of entitlements are subject to the general provisions of FEA's price regulations, which provide generally for a dollar-for-dollar cost pass through. This means that a refiner or importer which sells entitlements must count the receipts therefrom as a reduction of its crude oil or product costs. A refiner which must purchase entitlements, on the other hand, will be allowed to consider the cost of such entitlements as part of the cost of its crude petroleum. Therefore, since FEA pricing regulations allow increased crude oil and product costs to be passed through on a dollar-for-dollar basis, the effect of the cost equalization program will be to eliminate the gross disparities in

*On January 10, 1975, FEA issued a notice, Attachment F, specifying the adjusted national old oil supply ratio for the month of November, the name of each refiner or other eligible firm receiving entitlements, and the number of entitlements issued to that refiner or eligible firm. Required purchases of entitlements for the month of November must be made prior to January 31, 1975. FEA will hereafter publish a similar notice at the beginning of each month, containing information on transactions for the second month prior to the month in which such notice is published.

prices for the same product that have formerly prevailed at all levels of the distribution chain. It is anticipated that entitlements transferred in January 1975, the first month in which entitlements will be bought and sold, will result in some degree of cost equalization in February and will eventually bring prices into a much narrower range.

D. The Program Is Intended by FEA to Fulfill Various Objectives of the Allocation Act

42. As mentioned at the outset of the discussion of the cost equalization program, the disparity in average crude costs among refiners and the greater price competition accompanying recent periods of excess supplies of petroleum products have given rise to conditions requiring FEA action. These conditions have particularly affected small and independent refiners and independnet marketers. See Paragraphs 15-21 above. According to comments received by FEA in its rulemaking proceeding, many small and independent refiners have been forced to cut their margins and sustain reductions in their market shares as a result of their disproportionate reliance upon crude oil sold at uncontrolled prices (*e.g.*, new, released and imported).* The disparity in crude costs has also affected the competitive viability of a large segment of the independent marketing sector of the petroleum industry reliant upon products refined by high-cost refiners – in many cases, small and independent refiners, but in some instances, high-cost major refiners. Also, those marketers dependent upon high-cost imports of certain

*The dire circumstances confronting many small and independent refiners are reflected in comments filed with FEA, excerpts of which are found in Attachment G.

refined products, particularly No. 2 heating oil, have been placed at a competitive disadvantage.

43. FEA's cost equalization program is in direct response to these problems. As stated in the preamble to the November 7 further notice of rulemaking, the old oil allocation program was specifically designed by FEA to carry out, "to the maximum extent practicable," various objectives set forth in Section 4(b)(1) of the Emergency Petroleum Allocation Act:

> "To correct these inequitable conditions which FEA has found to exist, FEA intends to adopt this rule to allocate old oil equitably among all domestic refiners and to extend the benefits of such old oil to certain refined products at higher than domestic prices. FEA has concluded that the adoption of this proposed rule is within its authority under the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act") to provide for the equitable allocation of crude oil and refined products, at equitable prices, among all regions of the United States, among all sectors of the petroleum industry and among all users [§ 4(b)(1)(F)]. . . . Moreover, adoption of this proposed rule is warranted to assure the preservation of an economically sound and competitive petroleum industry and, in particular, the competitive viability of independent refiners, small refiners, nonbranded independent marketers and branded independent marketers. [§ 4(b)(1)(D)] Elimination of the economic distortion caused by unequal access to price-controlled domestic crude oil will also minimize unnecessary interference with market mechanisms that would otherwise operate more effectively to help achieve the overall objectives of the Allocation Act. [§ 4(b)(1)(I)] Finally, FEA believes that the adoption of this proposed rule is a necessary precondition to any future relaxation or elimination of allocation or price controls." 39 F.R. 39740.

With respect to the objectives of the Act which FEA believes will be fulfilled by the issuance of entitlement benefits, to a limited category of eligible firms importing No. 2 heating oil and residual fuel oil, see Paragraphs 35-37 above.

44. Second, and equally important, is the fact that the program is based on the broad allocation and pricing mandate applicable to FEA under Section 4(a) of the Allocation Act.* Indeed, in connection with the legislation recently passed and signed into law extending the Allocation Act through August 31, 1975 (P.L. 93-511), both the Senate and the House called upon FEA to implement a cost equalization program under the authority granted to it in the Allocation Act. *See* S. Rep. No. 93-1082, 93d Cong., 2d Sess. at 2 (1974) (The Act "provides ample authority for the FEA to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that the FEA intends to institute a price equalization program under existing authority in the immediate future."); H.R. Rep. No. 93-1443, 93d Cong., 2d Sess. at 3

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*Pursuant to Section 4(a), FEA is required to

"promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulations. . . ."

(1974) ("[T]he Act includes adequate authority to permit the FEA to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The FEA's stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee that specific amendments to the Act to compel such action may prove to be unnecessary.")

III. Lack of Irreparable Harm to Buyers of Entitlements.

45. FEA's cost equalization program will not cause irreparable damage to those refiners required to buy entitlements. Under the program and the refiner's price rule (10 C.F.R. § 212.83), the amounts expended to purchase entitlements are treated as product costs which may be passed along to customers, on a dollar-for-dollar basis, in the prices the refiner is allowed to charge for its refined products. Thus every cent expended by a refiner for entitlement purchases is allowed by FEA's price regulations to be recovered. To the extent that current competitive conditions will not allow full recovery of the costs of entitlements in current prices, a refiner may, under the pricing rules applicable to refiners, carry those costs over to subsequent months, when competition would not prevent their recovery at that time. 10 C.F.R. § 212.83.

46. During the rulemaking proceeding, FEA received and considered comments from some refiners

that they will nevertheless be injured by the program because they will no longer enjoy the competitive advantage of the lower crude costs which they are fortuitous enough to have. They argued that they might therefore suffer an irreparable diminution of their current market shares. While these consequences may possibly result from the program, FEA concluded that they are warranted in the circumstances and, in view of the profits being reported by many major oil companies, are not unjust or likely to threaten seriously their competitive viability. It should be emphasized that those refiners which are not required to buy entitlements under the old oil allocation program historically have had significantly lower crude costs than their competition due principally to the two-tier pricing system imposed on crude oil by the Cost of Living Council and then FEA. Thus, the competitive advantages that some refiners will lose as a result of these regulations were in large measure given them by other FEA regulations. The effect of the program will be, in effect, to return the industry to conditions extant in early 1973 when there was no great disparity between the prices of foreign and domestic crude oil.

47. A final reason that no refiner is likely to suffer irreparable injury is that any refiner suffering serious hardship or gross inequity as a result of the entitlements program may oətain appropriate administrative relief from the requirements of the program by filing an exception request with FEA's Office of Exceptions and Appeals. FEA has implemented an expedited procedure to deal specifically with requests for exception from the cost equalization program, see Attachment E, 39 F.R. 43814, and

one such request has already been granted in a joint application filed by the San Joaquin Refining Company and the West Coast Oil Company.

IV. Harm to FEA's Program and the Public Interest if an Injunction Issues.

48. Since the issuance of entitlements is calculated on the basis of the national old crude oil supply, an injunction relieving a single refiner from its obligation to purchase entitlements would cause a severe blow to the entire cost equalization program. Such an injunction would require a time-consuming recalculation of all entitlement issuances, would defer the operation of the program, pending a recalculation, for an indefinite period of time and, after the recalculation, the party obtaining the preliminary injunction would be placed at a competitive and financial advantage over those companies required to comply with the program. Further, these steps might be repeated several times as other refiners rush into other federal district courts seeking injunctive relief or such refiners may just choose to ignore the requirements of FEA's program. Accordingly, a court order preliminarily enjoining this program as to a single refiner would effectively disrupt the entire program for a considerable period of time. Moreover, any delay in the operation of the entitlements program will only serve to aggravate those serious problems outlined above confronting, among others, small and independent refiners and independent marketers. Thus, granting injunctive relief to an entitlement-buyer refiner would be contrary to public interest, because it would cause harm to those firms the Allocation Act was designed to protect, and

would be contrary to the objectives of the Allocation Act (*e.g.*, Section 4(b)(1)(D) and (F)).

/s/ John Vernon

Subscribed and sworn to before me
this 21st day of January, 1975.

/s/ Helen V. Allen
Notary Public

My commission expires: My Commission
Expires June 1, 1979

ATTACHMENT A

COMPARISON OF COMPOSITE PER BARRELL CRUDE OIL COSTS OF MAJOR INTEGRATED REFINERS AND SMALL AND INDEPENDENT REFINERS

A-1 – Graph

A-2 – Table of figures

COMPOSITE PER BARRELL CRUDE COST OF MAJOR INTEGRATED REFINERS AND ALL INDEPENDENT REFINERS

May 1973	
Major Integrated Refiners	$3.8207
Total Independent Refiners	$3.9109
November 1973	
Major Integrated Refiners	$5.3620
Total Independent Refiners	$5.6887
December 1973	
Major Integrated Refiners	$6.4828
Total Independent Refiners	$6.6736
January 1974	
Major Integrated Refiners	$7.2820
Total Independent Refiners	$8.1364
February 1974	
Major Integrated Refiners	$8.1677
Total Independent Refiners	$9.4748
March 1974	
Major Integrated Refiners	$8.4070
Total Independent Refiners	$9.6106
April 1974	
Major Integrated Refiners	$8.7247
Total Independent Refiners	$9.9125

May 1974	
Major Integrated Refiners	$9.1388
Total Independent Refiners	$10.0337
June 1974	
Major Integrated Refiners	$9.1717
Total Independent Refiners	$9.9688
July 1974	
Major Integrated Refiners	$9.0760
Total Independent Refiners	$9.9646
August 1974	
Major Integrated Refiners	$8.9579
Total Independent Refiners	$9.8224
September 1974	
Major Integrated Refiners	$8.9418
Total Independent Refiners	$9.7374

STIPULATION AND CONSENT ORDER

Filed March 15, 1976

[Caption Omitted in Printing]

The parties, by their undersigned counsel, this day of March, 1976, stipulate that they do not oppose the entry of an Order of this Honorable Court continuing the provisions of the Order of this Court entered May 5, 1975, a copy of which is attached hereto, pending the appeal of these proceedings, provided however, nothing contained herein is intended to be viewed as, or interpreted as, an admission by plaintiffs as to the merits of defendant's appeal from this Court's Final Judgement and Declaration and Order of January 27, 1976, or the Motion of Defendants To Stay The Judgment Of This Court Entered January 27, 1976.

/s/ JOHN A. WOODSTOCK,
Assistant Attorney General,
Attorney for Defendants.

/s/ LEWIS A. NOONBERG,
PIPER & MARBURY,
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Phillips Petroleum Company,

/s/ RICHARD A. REID,
ROYSTON, MUELLER, THOMAS
& MCLEAN,
Attorney for Plaintiffs
Petroleum Marketing
Corporation and
Commonwealth Oil
Refining Company, Inc.

/s/ FRED W. DROGULA,
GINSBURG, FELDMAN & BRESS,
Attorney for Plaintiff
Ashland Oil, Inc.

SO ORDERED

E. MACKELL CHILDS, Judge.

[Certificate of Service Omitted in Printing]

PROCEEDINGS

[T. 36] RICHARD T. HARVIN,
a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) Richard T. Harvin, 1221 Clearfield Circle, Lutherville, Maryland.

DIRECT EXAMINATION

By Mr. Noonberg:

Q. Mr. Harvin, by whom are you employed? A. Exxon Company, U.S.A.

Q. And in what capacity, sir? A. Retail sales manager for the Eastern Marketing Region.

Q. By the way, what is the Eastern Marketing Region consist of? A. Consists of the states of Pennsylvania, Maryland, Delaware, the District of Columbia, Virginia, West Virginia, Ohio and parts of Kentucky.

Q. How long have you been employed by Exxon? A. Thirteen years.

Q. Could you give us your educational background, sir? [T.37] A. I finished Clemson University in 1962 with a B.S. degree in mechanical engineering.

Q. And after you graduated from Clemson, did you then go with Exxon? A. Yes, I did, in 1962.

Q. In what capacity did you go in Exxon? A. I joined Exxon after graduating from Clemson as an industrial sales trainee.

Q. And could you give us a brief synopsis of the various positions that you've held with Exxon and the responsibilities that they entailed? A. Since joining Exxon in 1962 as an industrial sales trainee and after completing a year of training, I was transferred to the Tampa, Florida district as an industrial salesman. That would have been in 1963 and after two years of working

in the capacity of developing the fuels and specialty markets for the company, I became a general sales representative with responsibility for the day-to-day counseling of both dealer operations and company employees. In 1967 I was transferred to the Charlotte, North Carolina district office as a sales supervisor and at that time I had the responsibility for supervising five sales representatives who had the responsibility for the day-to-day counseling activities [T.38] of both dealer operations and company employees. After that assignment I was transferred to the Southeastern Region Office, that would have been in 1968, in the financial and business analysis section. In that capacity I had the responsibility for developing sales and expense forecasts, the responsibility for evaluating the sales and expense results and also the responsibility for economic evaluation of various promotions and programs. In 1969 I was transferred to the Jacksonville, Florida district office as district manager and my responsibilities entailed the supervision of approximately twenty sales representatives, sales supervisors and district personnel. In that capacity I had the responsibility for sales, expenses, administrative responsibilities in personnel development. At that point the Jacksonville district covered the northern portion of Florida as well as the southern portion of Georgia. Later in 1969 I was assigned as operations coordinator in the Charlotte, North Carolina region office and I had the responsibility for the overall coordination, planning of the region's pipeline terminals. This would have been responsibility for supervising approximately a hundred and twenty-five people. In 1970 I was transferred back to Florida again as district manager in the Miami district which covered [T. 39] the southern portion of Georgia and the responsibilities entailed the same as those covered in my remarks about the Jacksonville, Florida district. In 1971 I was transferred to the Houston, Texas

headquarters office in our marketing services group and I had the responsibility for developing strategies, policies and guidelines for the retail service station chain throughout the nation. Later in 1971 I was transferred to our corporate planning department and had the responsibility there for developing a corporate long-range financial forecast as well as an industry long-range financial forecast. In 1972 I was transferred to the marketing distribution and engineering section as distribution coordinator with overall responsibility for the company's pipeline and waterfront terminals in terms of planning facilities, evaluating results and coordination of those activities. In January 1974 I was transferred to the Eastern Region Office as market development manager. In that capacity I had the responsibility for implementing the headquarters strategies, policies and programs as well as developing additional region strategies and programs. I had the responsibility for coordination of motor gasoline, motor oil, tires, batteries and automobile accessory markets and I had the responsibility for the supervision [T. 40] of the administrative group, the implementation of both the voluntary and mandatory allocation programs and the staff support, coordination of staff support for all of our retail activities which included company operated stores. In June of 1975 I became retail sales manager, the position I now hold. I have the direct line responsibility for five retail districts covering the States of Pennsylvania. most of Maryland and the State of Delaware.

Q. Mr. Harvin, are you familiar with Exxon's marketing practices in the State of Maryland? A. Yes, I am.

Q. And indeed are you familiar with Exxon's marketing practices throughout the country? A. Yes, I am.

Q. Mr. Harvin, what brand names, by the way, has Exxon marketed under in the State of Maryland? A. In Maryland we've marketed under the brand names of Esso and Exxon and Esso Standard. We began marketing

under the name Exxon in 1973 and in 1972 we established a secondary brand called Alert.

Q. Mr. Harvin, would you describe how Exxon markets gasoline to the – how it gets from Exxon to the consuming public? [T. 41] A. Exxon markets its gasoline in a lot of different ways in an effort to meet what we feel are the needs and desires of the consumer and there's a very wide range of consumer preferences in the marketplace ranging from those who will sacrifice all service and traditional amenities such as repair service for quick service and lower prices. To react to that consumer preference companies operate various types of stores ranging from full self-service stores, limited service stores and all the way to facilities which repair – provide extensive repairing service capabilities.

The trend in industry in recent years has been to multi-pump island stores with limited service. As far as Exxon is concerned we don't believe that there is a prototype of the consumer in the marketplace today and we believe there is a very wide range; and we try to monitor consumer preferences on a daily basis and try to design our services and our facilities so that we are in the position to meet this wide range of consumer preferences. This would mean that Exxon participates in full self-service, Exxon participates in limited service, Exxon participates in conventional stores and Exxon also has a car care center type store. The Exxon branded stores are what is commonly referred to [T. 42] in the industry as major brand stores although Exxon does operate private brand stores under the name Alert. The primary difference between the two is that major brand services usually advertise the brand, they usually accept credit cards, they usually provide repair and service capabilities and private brand stores usually just sell motor gasoline, motor oil without repair facilities and usually do not take credit cards.

Q. Mr. Harvin, in connection with pretrial stipulations

that the parties have entered into I think the record reflects that as of December 31, 1973 Exxon branded gasoline was sold at approximately twenty-five thousand four hundred outlets located in about I think it's forty-five states and the District of Columbia and that of those twenty-five thousand approximately nine hundred and thirty-three were operated with company personnel. Could you give us some idea of how that relates to the Maryland situation? A. I'd like to take the dealer operated stores first, if I may. Dealer operated stores can generally be divided into two categories. The first category is where Exxon either owns or leases the real estate and improvements and the second category in which Exxon has no ownership either of the real property or the improvements. [T. 43] This latter type is called contract dealers and in the former type where Exxon either leases or owns the land and facilities are called lessee dealers and these facilities are leased or sub-leased as the case may be to the dealers.

The – Exxon has approximately three hundred and fifty-six retail stores where Exxon owns the facilities and leases or sub-leases to the dealer.

Exxon in the State of Maryland has approximately one hundred and fifty contract dealers.

In addition to the dealer operation it has also been stated that Exxon is engaged operating some stores on a company basis and as I believe it has been agreed there are thirty-two Exxon branded company operations in the State of Maryland and four Alert brand stores in the State of Maryland. In a company operated store the store is operated by company employees. The company makes the decisions as to what products and services are provided to the consumer. The company makes the decision as to what prices are charged for these products and services; and the company makes the decision as to what days and hours of operations that these stores are operated.

Q. Mr. Harvin, can you give us some idea of the [T. 44] relative percentages of company operation versus dealer operation both in Maryland and nationally for Exxon? A. I believe at the end of July 1974 Exxon had approximately seven percent of its stores in the State of Maryland operated by company employees, slightly less than seven percent.

Q. What has been the historical trend of that percentage number in the State of Maryland? A. Both in the State of Maryland and the – and the country the percentage and the number of company operated stores has been declining in the last three to four years.

Q. Mr. Harvin, perhaps to illustrate this, I'd like to show you what has been identified as Exxon's Exhibit #1.

(Court) Any objection?

(Mr. Woodstock) I've already stipulated to the authenticity of the photographs.

(Court) All right.

(Black notebook of photographs filed herewith as Exxon's Plaintiffs' Exhibit No. 1)

Q. Mr. Harvin, would you using Exxon's Exhibit #1 identify for the court the various types of stations that are illustrated in that booklet, both dealer and company operated? [T. 45] A. The photograph numbered one represents a typical car care center facility which Exxon operates on a company basis in the State of Maryland. There are some eleven of these locations with investments running as high as nine hundred and twenty thousand dollars. I think the average initial investment is approximately four hundred thousand dollars. The car care centers have typically between seven and twelve service bays as opposed to conventional stores which have between two and four service bays. The car care center

concept requires that in addition to normal minor repair service and maintenance service offered at conventional stores that we also engage in major automobile service to the consumer.

The photograph numbered one in this case is a ten bay car care center located in the State of Maryland and operated on a company basis.

The photograph numbered two again is a Exxon car care center operated on a company basis in the State of Maryland. As you will note the – we also have facilities for gasoline service in addition to the repair and service capabilities at this particular location. You will also note and it's a little hard to see in the photograph that we are offering an innovation to the consumers at this particular lcoation, that is, one [T. 46] pump island is full service and one pump island is what we call express lane service where there is no driveway service and all the customer does, is comes in an attendant pumps the gasoline and the labor savings results in a lower price for the consumer.

If I could refer the court to photograph numbered three, I think this probably better illustrates the express lane concept that is used in conjunction with not only car care centers but all company operations in certain locations.

(Court) Three and one are the same, aren't they? A. It's the same location, yes, sir.

(Court) All right. A. Photograph number four I think probably better illustrates the service bays that are found in a typical car care center and similar type work that is performed in a car care center. As you can see this is a five bay – ten bay, excuse me, car care center and the services that are provided are brake service, wheel alignment, tune-ups, muffler work, power-trained transmission work and others.

Photograph number five illustrates some of the sophisticated and complicated testing equipment that's [T. 47] required in a car care center to complete – to properly perform the array of services offered to the consumer.

Photograph number six is a further illustration of some of the equipment that's contained in a car care center. I might add at this point that car care centers are in competition with mass merchandisers, department stores, specialty shops, tire stores and other people who specialize in automotive repair and service capabilities.

Photograph number seven illustrates a tire display which is in our customer lounge. I also would like to make a point that in addition to repair and service capabilities Exxon also engages in the retail sale of tires, batteries and automobile accessories.

Photograph number eight is a copy of the Exxon Company USA guaranty, this is a nationwide guaranty which is provided to the consumer for any work performed at the car care center. This work is guaranteed not only at the car care centers in the State of Maryland but the car care chain throughout the nation.

Q. Mr. Harvin, while you're on the subject of car care centers, are all the car care centers operated by Exxon in the State of Maryland on a company operated basis? A. Yes, they are. All car care centers in the [T. 48] State of Maryland as well as throughout the country are operated on a company basis.

Q. And why is that? A. We feel that in order to directly sponsor and control an investment that sometimes ranges up to nine hundred thousand to a million dollars it is necessary to operate the store on a company basis. We feel like that this is the only way to standardize performance standards and this is, of course, the only way that we can provide a guaranty to the consumer.

Q. Why don't you continue, Mr. Harvin? A. The photograph number nine is a self-service location in the State of Maryland operated by company employees. This facility is operated with one employee per shift and we are able to supervise a number of these locations with one field representative. This provides fast service for the consumer and the efficiency that has been manifested by one employee per shift and the supervision of multiple operations manifests itself in a lower price to the consumer in the State of Maryland.

To save the court some time, photographs number 10 and 11 are also illustrations of the same self-service store that was illustrated in photograph number 9.

If I may proceed then to photograph number twelve, [T. 49] this is a conventional store which is also operated by company employees and as far as Exxon is concerned, this is an extremely important link with the consumer. Through operation of these stores, we are able to monitor on a day-by-day basis the consumer preferences and how that may shift over a period of time.

The photograph number thirteen is also a conventional store with three bays operated by company personnel. This particular store is in conjunction with a car wash as you can see from the right hand corner of the photograph.

Photograph number fourteen is the same location as contained on photograph thirteen but I think it better illustrates one of the innovations that has been made possible by company operations and that is a self-service island. This particular store has one full-service island and one self-service island. This enables us to compete for that segment of the consumer population, those who are interested in fast service and lower price.

Photograph number fifteen is also another shot of the car wash that I spoke of previously. I might add that if

you will note the sign on the left hand side of the photograph again this is an innovation that has been tried at the company operated stores. This [T. 50] is a carry-out motor oil display and signing package. Things like this, functional innovations like this are tried at company operated stores and if proven successful then these are taken again to our dealer organizations for their consideration in use in their business.

Photograph number sixteen again illustrates the car wash which is in conjunction with this three-bay conventional store operated by company employees.

Photograph number seventeen is a typical three three-bay conventional store. This particular facility is participating in the carry-out motor oil. It is also participating in partial self service. So we have one full-service island here and one partial self-service island.

Photographs eighteen and nineteen merely illustrate the type of aftermarket business that we're in in company operated conventional stores. As you can see, we have gasoline availability. In this particular store we have full service on one island, self service on one island, we've in the carry-out motor oil business and we're selling tires and there are also some battery displays. In photograph nineteen you can see some of the tire displays.

In photograph twenty this illustrates the other [T. 51] automobile accessories that are being sold at company operated stores.

Photograph number twenty-one is merely a further illustration of tire displays and the fact that company operated stores are in the automobile aftermarket business also.

Photograph number twenty-two is a company operated store which is being operated by company employees in conjunction with a contract with the Maryland Transportation Authority on the Kennedy Expressway. This

facility is owned by the State of Maryland and operated by Exxon with company employees. We feel that in order to comply fully with our contract with the Maryland Transportation Authority that it is necessary to operate this store with company employees to insure pricing in accordance with the contract, service levels in accordance with the contract, as well as hours of operation.

Photograph number twenty-three is merely another shot of the Maryland – the store operated in conjunction with the Maryland Transportation Authority on the Kennedy Expressway; and this particular store serves both north and southbound customers. The store is open twenty-four hours a day and provides two service vehicles in compliance with the contract with the State [T. 52] of Maryland.

The photograph number twenty-four is an illustration of an Alert branded outlet. As I mentioned previously there are four Alert locations in the State of Maryland. The first was opened in 1972 in an effort to gauge the the potential of a private brand section of the market. These facilities sell gasoline and motor oil only. They do not have repair service capabilities. They do not accept credit cards and are designed to emulate the private brand operation of high volume, low overhead cost and lower prices.

Photograph number twenty-five is a two-bay facility with two pump islands for gasoline sales. This particular store is dealer operated and as you can see from this photograph, the dealer has some capability for minor service work, is also displaying tires and is involved in the aftermarket business.

Photograph number twenty-six is also a dealer operated store. This is a four-bay facility providing tire, battery accessory sales and some minor mechanical work. The

store is also involved in full-service and self-service gasoline facilities.

Photograph number twenty-seven is also a four-bay dealer operation located in the State of Maryland. [T. 53] This facility also has the capacity for selling gasoline, tires, batteries, accessories and some minor mechanical repairs.

Q. Would that be a typical major brand dealer operated station, Mr. Harvin? A. This would be a typical major brand dealer operated station.

In my remarks earlier I referred to the fact that Exxon had approximately one hundred and fifty contract dealers in the State of Maryland. In the photograph on – number twenty-eight is a typical contract dealer with facilities of a typical contract dealer. This is a case where the real estate is owned or leased by the dealer. We only have a supply contract with the dealer. This is a two-bay facility with gasoline capability as well as service capability.

The photograph number twenty-nine is again a contract dealer with an ancillary business. This particular contract dealer has gasoline facilities, he has some minor amount of service bay facilities and is also operated in conjunction as a parking garage.

Photograph number thirty again is a contract dealer, typical contract dealer. This facility provides gasoline service and also is operated in conjunction [T. 54] with a convenience food store.

While the book does not contain illustrations of reseller service stores, at this time there are approximately one hundred reseller service stores under the Exxon brand in the State of Maryland. Facilities are normally either conventional stores operated in conjunction with some ancillary business such as the convenience foods or parking garages, maybe even car washes.

Q. How does the reseller get his gasoline, Mr. Harvin? A. Reseller purchases gasoline, Exxon resellers would purchase their gasoline from Exxon and resell the product to their dealers.

Q. Mr. Harvin, I believe that you testified that in the State of Maryland Exxon has approximately ninety-four percent of its stations operated on the dealer basis. Does Exxon have any plans to change that percentage? A. No, we do not. In the thirteen years that I've been with the company we've always operated the predominant number of our stores on a dealer operated basis and we have no plans to change that position. We feel that dealers are the backbone of our business. Their right of enjoyment to their premises is honored by Exxon. [T. 55] We do not and have not terminated dealers for the sake of operating them – operating the store on a company operated basis and we don't plan to change that position in the future. While this is the case, we feel that it is extremely important that we be able to operate some of our stores on a company operated basis.

Q. Would you, Mr. Harvin, describe for Judge Childs what those reasons are why Exxon believes it's so important to operate some of its stations on a company operated basis? A. There are three general reasons why Exxon feels it's extremely important to operate some of its stores on a company operated basis. Those can be number one we feel that it's extremely important to Exxon to be able to directly monitor the customer preferences in the marketplace and these are evolutionary. They change from day to day and this is Exxon's link with the consumer in the marketplace. If we did not have company operated stores, we would be merely wholesalers and we would have to depend on secondary information as to the effectiveness of the Exxon retail offer in the marketplace.

Q. You indicated that there were – there were three reasons. You've indicated one. What are the other two? A. The second reason is that it's in Exxon's [T. 56] judgment that company operations enhance the dealer operations in particular and the marketplace in general. We believe that our participation in the full range of consumer preferences enhances the Exxon brand image both in the State of Maryland and nationwide and that the dealers benefit from that enhancement of the image.

The third reason is that Exxon makes a retail profit by operating stores on a company operated basis.

Q. What was that profit in the last fiscal year if you have information available, Mr. Harvin? A. In 1974 that was approximately seven hundred thousand dollars which Exxon enjoyed by operating stores on a retail basis that we would not have enjoyed by operating the stores on a dealer basis.

(Court) Where was this? A. Excuse me, sir, in the State of Maryland.

(Court) Oh. A. That would represent an approximate fifteen percent after tax return on those investments dedicated to operating at retail which are primarily inventory and equipment.

Q. From your vantage point as a Exxon representative are there other advantages to the consumer and to the independent dealers because of Exxon's operation of [T. 57] company operated stations? A. Yes, I think there are a lot of advantages.

Q. What are they, sir? A. Well, with company operations Exxon is able to experiment with merchandising ideas, with operating procedures, with financial controls and with various types equipment. We feel that we can only do this in a laboratory controlled condition and when these techniques are proven successful, then we

take them to our dealer organization and encourage their participation. Another very vivid example I think of innovations which the Exxon Company has been able to do through the operation of company stores is the car care center concept. Had we been unable to operate those stores on a company operated basis, we probably would not have developed car care centers in the State of Maryland and we certainly would not be able to provide the nationwide guaranty that we're doing. Another institutional innovation that's been developed through the operation of company stores is the partial self service. This was illustrated to the court in several of the photographs, this was a program that was tested in company operated stores two or three years ago and has proven successful and has now been introduced to dealers at no cost to the dealer. [T. 58] Exxon's cost in providing this is approximately seven hundred and fifty dollars per dealer store. The type things that were tested in conjunction with the partial self service program were what's the proper signing to signal the customer as he approaches the driveway that one island is full service and one island is partial self service; what's the best equipment to use; what's the best credit collection to use; should we use credit cards or partial self-service islands and more important than any of those I think is we're able to estimate for the dealer how much business he would be able to attract to his partial self-service islands.

Another very important, I think an extremely important way that company operated stores have been used is that in 1962 Exxon entered the Florida market. This was a market that we'd never been in prior to 1962. We were unknown in the market at that time. We had no brand image. We were unable to attract dealers. Stores were unable to provide sufficient income to the dealer so Exxon elected to operate those stores on a company operated basis until such time we could build a volume through

proper operation to the point that the dealer could make a living and at that time the stores were leased to dealers. This was done –

[T. 59] Q. What period of time did that encompass? A. This was some five or six years later. So that would have been in 1967, 1968.

Q. And what percentage of the stores that Exxon has in Florida are company operated and what percentage are dealer operated, if you know? A. I'm not sure of the exact percentage, sir, but I would think less than five percent are company operated at this time.

Another very important way that company operated stores are used is the introduction of the Alert brand in Maryland in 1972. As I've stated previously to the court, the purpose of that was to gauge the potential of the private brand sector of the market and we operate that store with company employees to be able to react quickly and to be able to directly monitor the results of that operation. Had we been prohibited from operating company stores in the State of Maryland in 1972, we would not have come into the market with Alert stores.

Another reason company stores are operated on a company basis is that in Exxon's judgment this is the most efficient way to operate the store and I would use a full self-service store to illustrate that point because we only have one employee per shift and we can supervise [T. 60] many stores with one field representative. Because of those reduced expenses, we're able to sell to the consumer at a lower price.

Other ways in which company operated stores are used and other benefits to the company operated stores are we use those facilities to train dealers and train company employees. We use those stores to assure continuity in operation. For example, if a dealer dies or

leaves suddenly, the store is operated on a temporay salary basis to provide some continuity for the customers of that store and to provide some continuity for the incoming dealer.

Another way that – important way that the company operated stores is used is that we, for example, have customer complaints and the dealer and the customer are unable to agree as to what the corrective remedy is, Exxon in some cases will redo the work at company operated stores to maintain that customer's patronage; and as I mentioned going through the book with the photographs, we also operate the one store on the Kennedy Expressway in conjunction with a contract that we have with the Maryland Transportation Authority.

Q. Thank you, Mr. Harvin.

Mr. Harvin, are you familiar with Chapter 854 [T. 61] of the Laws of Maryland 1974? A. Yes, I am.

Q. And have you reviewed Paragraphs B and C of that Act particularly? A. Yes, sir, I have.

Q. Focusing your attention on Paragraphs B and C of the Act, I'd like to ask you what effect, if any, you think the effectuation of those provisions would have on Exxon. I hand you a copy of the pretrial order which contains a copy of those provisions. A. In my opinion this would preclude Exxon from operating its stores on a retail basis in the State of Maryland. It would preclude Exxon from enjoying any retail profits on its company operated basis in the State of Maryland. It would preclude Exxon from being able to directly monitor the effectiveness of its retail offer in the State of Maryland and, therefore, may affect our long-range plans in the State of Maryland. It would also preclude Exxon from participating in the retail sale of tires, batteries, automobile accessories and repair and service work in the State of Maryland. Car care centers I can make that comment specifically to these type operations. As I mentioned earlier without

company operations Exxon would build no additional car [T. 62] care centers in the State of Maryland; and, if fact, I don't believe that Exxon could continue to provide the nationwide guaranty to consumers in the State of Maryland. We think that the statute precludes Exxon from getting a fair rate of return on its investment. If the law is upheld, in all probability we'll be able to lease some of the conventional stores in the State of Maryland to dealers. However, I would doubt that we would be able to get a fair rate of return on our car care center facility because of the complicated and sophisticated equipment that's required to provide the type services that are provided to the Maryland consumer. In the Alert operation because we are competing in the private brand segment of the market, it's extremely important that we practice with the private brand sector of the market and under the current anti-trust laws we would be precluded from having any assurance that that would continue if the Alert stores were leased to dealers in the State of Maryland.

Q. Thank you, Mr. Harvin.

Mr. Harvin, are you familiar with the provisions of Paragraph F of Chapter 854? A. Yes, sir, I am.

Q. Well, let me ask you one other question [T. 63] I – before I move on to that subject. You indicated that in your judgment you believed that Exxon would not be able to get I think you said fair – fair rental value out of some of the car care centers. Would you explain the basis of that statement? A. The investment in a car care center as I indicated earlier can range up to almost a million dollars and included in those facilities are a lot of very complicated and very sophisticated testing equipment that's needed to perform those service capabilities. I don't believe that we would be able to maintain those facilities and I don't believe that we would be able to attract people to give us the proper rate

of return (word unintelligible as someone slides microphone across the table) dealer operated.

Q. Are you familiar with the dealer operation that Exxon has in Maryland and throughout the eastern region at the present time? A. Yes, I am.

Q. Mr. Harvin, I hand you again this pretrial stipulation and direct your attention to Paragraph F of Chapter 854 of the Laws of Maryland 1974. Are you familiar with that provision? A. Yes, I am.

[T. 64] Q. Mr. Harvin, that relates to a allocation formula of some sort, does it not? A. Yes, sir.

Q. Could you briefly explain what the Exxon allocation formula has been? A. Motor gasoline, both in the State of Maryland and nationwide, is controlled by the Federal Government pursuant to the Emergency Petroleum Allocation Act of 1973. Since its inception Exxon has been in full compliance with the provisions of that Act and the regulations promulgated under that Act. Prior to the Act being passed, in June or July, excuse me, 1973 in response to a tightening supply situation and in a response from – request from government officials Exxon began voluntarily allocating motor gasoline. A system was developed which divided the available gasoline supplies by class of customer into each customer within that class on a fair and equitable basis and on the basis of historical sales. A monthly motor gasoline norm was developed for each customer on the basis of the prior two years experience plus an adjustment for recent trend. In December 1973 –

Q. Excuse me, before you leave that subject, Mr. Harvin, was in that formula, that voluntary formula, was there any distinction made between company operated [T. 65] stores and dealers operated stores? A. None at all. Both company operated stores and dealer operated stores were on the same basis.

Q. Please continue. A. In December 1973 Congress passed the Emergency Petroleum Allocation Act and and Exxon has been in compliance since that time. That was effective February 1974.

Q. Is that Act in force now; A. Yes, it is.

Q. Are you familiar with the federal allocation program? A. Yes, sir, I am.

Q. Are you familiar with Exxon's efforts to comply with that program? A. Yes, sir, I am.

Q. Are you able to state whether or not that federal program is in conflict with the requirements contained in Paragraph F of Chapter 854? A. In my opinion, it is in conflict.

Q. Could you briefly explain to the court the basis upon which that statement is made? A. The federal regulations contain provisions for hardships, contain provisions for redirectives, contain provisions for state set aside program and contain [T. 66] the provisions for priority in users. The Maryland provisions do not contain any of these four elements.

Q. Mr. Harvin, again directing your attention to Paragraph F of the Act, you see there a reference to periods of shortage. Do you determine – can you determine what a period of shortage is? A. No, sir, I cannot from the provisions.

Q. Have there been any regulations that you're aware of defining what a period of shortage is? A. No, there have not been.

Q. Who determines, Mr. Harvin, whether that shortage is a shortage in Baltimore City or the State of Maryland or the nation or some part thereof? A. I have no idea.

Q. And who determines whether or not that shortage is based upon an industry shortage or a shortage for some other reason such as because a refinery of Exxon's has

been disabled? A. I don't know. It's impossible to tell from the provisions of the Act.

(Mr. Noonberg) I have no further questions of Mr. Harvin.

CROSS EXAMINATION

BY MR. WOODSTOCK:

Q. Mr. Harvin, my name is John Woodstock, Assistant [T. 67] Attorney General for the State of Maryland. I believe you testified to the effect that the overall number of company operated service stations by Ex – operated by Exxon has reflected a trend of decrease, is that correct? A. That's correct, sir, since 1971.

Q. Since 1971. Is 1971 of any particular significance in this company operated program? A. No, it's not.

Q. How long has it been under way? A. Company operated stores, sir? In the thirteen years since I've been in the company, we've had company operated stores.

Q. Can you identify a Exxon employee by the name of L. G. Rawl, R A W L? A. Yes.

Q. Who is he? A. Mr. Rawl is a member of our management committee Exxon Company USA in Houston.

Q. Does he sit on the Board of Directors? A. No, he does not.

Q. Would you expand a little bit on what he does, what's his position requires him? A. Mr. Rawl is the contact member on the Management Committee for marketing, prior to that was vice president – [T. 68] vice president of marketing for Exxon Company USA.

Q. I show you a document that was provided the State in response to its discovery and ask you if you can possibly identify what the document pretends to indicate.

(Witness reading document to himself)

Q. Can you identify the document? A. This is a document of opening comments by Mr. L. G. Rawl, its a

method of operation presentation to whom it was made I cannot be certain.

Q. In your counsel's transferral of the document to me it was indicated that there is also a date on that document written up in the corner I believe. If you would read the date please, I'd appreciate it. A. The date is December 1971.

Q. Can you make out what else is written up there? A. Yes, it looks as though it may be a Board presentation.

Q. What – what board would that be? A. At that time this would have been the Exxon Board. I'm sorry, sir, that would have been the Board of Directors for Humble Oil and Refining Company in 1971.

Q. Okay. Would you do me a favor and maybe flip through some of the pages and I believe the presentation [T. 69] was of a particular type. I would like you to perhaps identify what type of presentation, whether or not there were props used or anything to that effect. A. It appears to me that there were Vu-graphs used in conjunction with the presentation and it looks as though the presentation contains what the current situation is in terms of company operated stores, a little bit about the past and what Mr. Rawl's opinion of what the future looked like.

* * *

[T. 70] (Court) Well, can't you read him the portions of the document wherein Mr. Rawl's testimony may differ with Mr. Harvin's testimony.

(Mr. Woodstock) That would be fine if the record can reflect the fact that the document is forty-eight pages long, that it was a presentation to the Board of Directors of the Humble Oil Company and that it deals with the marketing of company owned and operated service stations and it's directly related to his testimony as to

the decrease in the trend of the numbers of those company operated service stations. I would think that to maintain a full record providing three pages from a document that he's already identified as a vu-graph sheet might not have the impact and comport with the [T. 71] full nature of the document unless that whole document is in. The significance of the statements here that I'm going to question him about, I believe, is directly related and the impact of it is greater when you consider this was a presentation to "the" Board of Directors.

(Court) All right, the record can reflect that.

* * *

[T. 73] CROSS EXAMINATION (Continued)

BY MR. WOODSTOCK:

Q. Is it Mr. Harvin or– A. Yes, that's correct, Harvin.

Q. Mr. Harvin. Once again I give you this document. [T. 74] Did you read it over lunchtime? A. Yes, I did.

* * *

[T. 74] Q. After you read it, are you familiar with the contents now? A. Generally, yes.

Q. Sufficiently to describe to the court what's in the document? A. Yes, this appears to be a Board presentation made in December 1971. It was introduced by Mr. L. G. Rawl, who at that time was a member of the Humble Oil and Refining Company Board of Directors, the presentation itself, the primary nucleus of the presentation itself was made by our marketing vice president, Mr. Duvall Dickey, also Mr. Graham, our employer relations manager.

Q. In your capacity with Exxon, have you ever come in contact with the document? A. I have not read this particular document.

Q. Are you familiar with any of the policies contained within that document? [T. 75] A. I'm generally familiar with the policy concerning company operations, yes.

Q. Does that Document purport to reflect those general policies regarding company operation? A. The document reflects the general trend and the direction of the number of company operations, yes.

Q. Once again I believe you said in your direct testimony that the trend has been a decrease in the company operated stations, is that correct? A. That is correct and I cited since the early seventies.

* * *

[T. 77] Q. Mr. Harvin, would you please read verbatim that page? A. "This Vu-graph presents a profile of our company operated stores. The first column shows the profile of our present company operated chain at the end of the first ten months of 1971. At that time we had a total of thirty-one hundred and twenty-three company operated stores. The majority of these stores" and I'm sorry I can't read the number but it's a little over twenty-six hundred "were company operated conventional stores. Most of them were commission operated. Twenty-six hundred and eighteen. And some were operated on a planned salary basis, in parenthesis twenty-five.

At the end of ten months we had an additional three hundred and forty-two temporary company operations. This has been" – I'm sorry it did not Xerox, I assume that's consistent "for a number of months and is an acceptable level when we consider our historical experience. In the Alert chain we had one store open in October on a salaried basis.

The second column illustrates the three hundred and eighty conventional retail stores that we could operate on a company basis based on the pure breakeven economics [T. 78] presented on the previous Vu-graph.

Car care, grassroots self-service and tunnel car wash are projected to be operated on a company basis. The number of stores shown are consistent with our budget

forecast. On this basis, we would have about six hundred and fifty stores on the new company operation at the end of year one.

We would expect to maintain our present level of temporary company operations. Alert's growth is shown to be consistent with the present forecast.

The third column represents the profile of the proposed company operated chain at the end of year four. Several factors have been considered, the projected growth of conventional stores is primarily the result of new stores. Sixty percent meet profit criteria and in – are in markets where the plan will be implemented based on Houston MIP experience. Meeting the breakeven economic criteria" and in parenthesis "after the second year unprofitable stores are converted to dealer."

Q. Would you repeat that last part to me? What was in parenthesis? A. I didn't finish, sir. "After the second year unprofitable stores are converted to dealer dash thirty percent first year, ten percent thereafter.

[T. 79] All of our car care centers are projected to be operated on a company basis and their growth is consistent with our long range forecast. Through year two our grassroot self-service and tunnel car wash are projected to be totally company operated. In years three and four we're projecting that it will be desirable to convert some of these stores to a dealer operation, approximately fifty percent of the long range forecast.

In summary, based on the economic case, we expect to have twelve hundred and twelve stores on a compnay operated basis in year four plus the temporary operations in the Alert chain."

Q. Thank you. I'd like to ask you a few questions about the part in parenthesis where it said "After the second year unprofitable stores are converted to dealers." Does that mean it's an independent dealer? A. I would assume that would mean to an independent dealer, yes.

* * *

[T. 80] Q. Okay, does that particular statement that we've been discussing say that when Exxon finds a particular location that is company run does not show a profit that they will then go out and seek to fill that location with a dealer? A. Yes, however, I think you need to understand [T.81] that the economics are a little bit different.

Q. Well, I'm going to get into that now. Is it Exxon's position that a dealer could take that formerly company owned and operated location, run it and make a profit? A. In certain cases, yes, sir. In certain cases either if a dealer or Exxon could not make a profit, then the station is surplussed out of the chain.

Q. I noticed that fact is not mentioned in here. Can you give me an idea how many of those stations are factored out of the chain? A. Yes, sir, last year eight hundred and sixty-eight stores nationwide were surplussed out of the chain.

Q. How many unprofitable locations run by Exxon were turned over to dealers? A. Are you asking how many stores formerly operated by Exxon were turned over to dealers?

Q. Yeah, that were formerly identified as being unprofitable? A. I don't have the information concerning that. There were in 1974, I believe, around thirty-five, thirty-six stores that were converted from company operation to dealer, but I have no idea that these were unprofitable stores.

[T. 82] Q. Can you identify that page and identify for the court what that purports to say or what it reflects? Is it another Vu-graph sheet? A. It is another Vu-graph sheet, yes.

Q. Would you please read it? A. The Vu-graph is en-

titled "Company Operations Number of Stores." "The case is illustrated on this Vu-graph.

In order to institute the company operations in the desirable markets, we propose to operate six hundred and seventy-seven conventional retail stores in year one compared to three hundred and eighty conventional stores in the economic case. Two hundred and ninety-seven additional stores presents us with a much more attractive operating base. We can effectively institute the program in thirty-nine of our present districts. Additionally this strategy is economically attractive when we consider the influence of proper retail practices on our wholesale and downstream profits.

In year one all of the two hundred and ninety-seven stores would be projected to generate volumes in excess of fifty thousand gallons per month. They average approximately fifty-four thousand gallons per month today.

[T. 83] As new conventional stores are brought on stream in years one and two, those stores which did not generate a retail profit will be converted to dealer operations. The net effect of this program will be to hold the number of conventional stores constant through the first four years of the program. At that time, our chain of conventional stores would be on a pure economic basis as previously reviewed.

The remainder of the chain is consistent with the previous economic case.

In this case, we would have nine hundred and forty-six stores by the end of year one plus the temporary Alert stores. This is our recommended strategy for implementing the new method of company operations."

Q. I'd like to discuss what the fourth paragraph, fourth full paragraph on that page says. "As new conventional stores are brought on stream in years one and two, those stores which do not generate a retail profit will be

converted to dealer operations." That's all – I'm assuming that what the document says purports to be the truth, is that – am I correct in that assumption? A. I would assume so, yes, by reading the document.

Q. Mr. Dickey, I believe he made the presentation? A. Yes.

[T. 84] Q. He's a pretty respected man? A. Yes.

Q. He is. Name's on all the letterheads I believe.

"The net effect of this program will be to hold the number of conventional stores constant through the first four years of the program." Now I may be wrong, but it appears to me that Exxon is starting off with a large number, for a period of time they operate them. They then come to the conclusion whether or not they can turn a profit at the lcoation. After a certain period of time, they factor in not getting rid of the location but getting rid of it to a dealer; thereby keeping the number constant, it never is going to inflate because they keep adding new ones, weeding out bad ones. Am I right in that interpretation or am I drastically wrong? A. I can't – I can't –

Q. I'm talking about mathematics. Mathematics now. A. I can't agree with that. You've made the assumption that most of the stations, in fact I think you said all of the stations which were deemed to be unprofitable for Exxon were converted to dealer and that's not the case.

Q. I didn't make the assumption. I'm asking you [T. 85] to explain the statement here made without qualification in a presentation to the Board of Directors of Exxon Corporation that quote "As new conventional stores are brought on stream in years one and two, those stores which do not generate a retail profit will be converted to dealer operations."

(Mr. Noonberg) Objection. Your Honor, counsel has totally mischaracterized the document. If he has read the

document, he will see that it presents three alternative strategies to the Board. No one of which has either been – as far as the testimony here is concerned implemented whether page 16 or whatever page Mr. Woodstock had Mr. Harvin read has been implemented or whether in fact it was accepted by the Board, we don't know. All we do know is that Mr. Harvin read it.

(Mr. Woodstock) Your Honor, for that – on the same basis, we don't know whether the Exxon Board of Directors has approved every single activity that Mr. Harvin has testified to. Now I am willing and I propose to submit the entire document for the court's review. What I'm saying is the man was put on the stand by Exxon to testify as to Exxon's company operations and here's a document whereby –

(Court) But these are proposals, [T. 86] Mr. Woodstock, and I don't think you can use a proposal as an out and out basis of operation.

(Mr. Woodstock) I believe the witness' testimony was that this man – this does reflect company operations policy of Exxon. That's why we had him read it at lunch time.

(Court) Does it reflect it now is what I'm intersted in knowing.

(Mr. Woodstock) The document was projected –

(Court) See, I haven't read it at all and I'm hoping I can read as little of it as possible in view of all that business over on the stand over there, but if it's been put into operation, then I think it might be pertinent, but if it's just various proposals which the Board is to act on and decide whether to go along with one proposal or the other, I think it's immaterial.

Q. Mr. Harvin –

(Mr. Woodstock) May I –

(Court) Yes, go ahead.

(Mr. Woodstock) – see if we can clarify the materiality.

Q. Mr. Harvin, are the numbers that you read company owned and operated stations, those figures contained in this document –

[T. 87] (Mr. Noonberg) Which figures are you referring to?

(Mr. Woodstock) The total number of company operated stations as of 1973 the witness testified he was in charge of these things and has knowledge of them.

Q. Are they reflective of what the situation was number one in 1971 to your knowledge? Number two; in projected years one and two –

(Mr. Noonberg) Mr. Woodstock –

Q. –would bring us to 1973.

(Mr. Noonberg) I would just like –

(Court) No, sir, no, sir. That – That's not the question before the house. We have already stipulated, if I am not mistaken, as to in the pretrial order the numbers of the operating stations not only in Exxon but all of them. Now if you want to bring in some testimony as to what the present policy is, not what the proposal, but what the policy is of Exxon, I think it's pertinent; but to have two or three people make presentations before a Board of Directors and then saddle Exxon with what they proposed rather than what the Board did, I think is just completely off the beaten path.

(Mr. Woodstock) If this witness is not able [T. 88] to testify as to what the Board of Directors and the people in Houston do –

(Court) He's never been asked that.

(Mr. Woodstock) I've asked him if he could testify.

(Court) All right, ask him again, I didn't hear the question.

(Mr. Woodstock) – as to the validity of that document.

Q. Mr. Harvin, you previously testified as to the number of company operations currently in effect by Exxon in Maryland as well as the United States, is that correct? A. That is correct, sir.

Q. Are you familiar with the policy utilized by Exxon to arrive at that figure? A. The policy of Exxon is to – is currently and has been not to terminate dealers to put stores on company operation.

Q. I am talking about the internal decisions made by Exxon Corporation as to how they arrive at the total number of company run shops. Are you familiar with that information? A. I have not been involved in that discussion, no.

Q. At all? [T.89] A. Not at all.

Q. Never? A. Never.

Q. Not for the State of Maryland? A. The State of Maryland, I have some jurisdiction over the number of company operations in the State of Maryland, yes.

Q. Does your familiarity with the situation in Maryland go back to perhaps 1971, '72 or '73? A. I came into the State of Maryland in January 1974.

Q. In 1974. How many car care centers are there in the State of Maryland presently? A. Eleven.

Q. How does that compare with the total in the United States? A. I'm not sure of the exact number in the United States, I think there are approximately a hundred and thirty-five.

Q. I believe the number was a little bit lower. I believe it was a hundred and twenty-three major service centers nationwide which operate under the logo car care center and has seventy-four full service stations nationwide, Footnote 3 to Particular of Facts to Exxon Corporation, the Pretrial Order page 5, so do you change [T. 90] your testimony as of July 1, 1974 – would it be your testimony that Exxon had a hundred and twenty-three car care centers?

(Mr. Noonberg) Well, we have a stipulation to that effect, Your Honor, No dispute about that.

Q. Is there any particular reason why the little State of Maryland would have approximately ten percent of the total Exxon car care centers in the nation? A. This, Maryland market represents an extremely – extremely good market for Exxon and this is a market where we have good brand acceptance and this was one of the intitial car care center markets because of that reason.

Q. Was the car care center in fact tested in Maryland? A. This was one of the test markets, yes.

Q. I'd like to switch to the Alert brand. A. Yes, sir.

Q. How many stations, Alert stations do we have in Maryland as of today? A. Four.

Q. Four? A. Four.

Q. Do they sell Exxon gasoline? A. No, they do not.

Q. What gasoline do they sell at the Alert station? [T. 91] A. They sell Alert gasoline.

Q. And from where is that obtained? A. Alert gasoline is obtained on exchange.

Q. From whom? A. Currently from BP.

Q. Six months ago? A. I believe from BP. I have no exact knowledge on the Alert operation because I'm not responsible for the operation of the Alert stores in the State of Maryland.

Q. I believe you testified regarding the specialized equipment found in the Exxon car care centers. If you would, I'd like to ask you a few questions about the list of specialized equipment. Before we go into the list, let me ask you as part of your position with Exxon are you familiar with retail service station operations? A. In the State of Maryland, sir?

Q. I don't care, anywhere. A. Yes.

Q. When's the last time you've been inside a service station? A. I believe that was last Thursday.

Q. Item number one a Start-a-Car Unit. Would you

describe for me please what that exactly is? A. I believe this is a battery unit which is capable [T. 92] of starting the car when the battery goes bad.

Q. That – that's, if I'm correct in my description, is a battery that some people push on a hand truck and it has some wires coming out with two clamps that you put on the other person's battery and starts the car, is that correct? A jump starter or jump, right? A. That's generally the purpose that it serves, yes.

Q. Or a hot shot, I think it's sometimes called. Now would it be your testimony that this type of Start-a-Car Unit is a specialized equipment found in Exxon car care centers and is unique to that type of operation? A. No, sir.

Q. Would it be your testimony that that type of equipment is found just about in any retail service station? A. Generally the Start-a-Car Unit is found in retail service stations with service capabilities and repair service capabilities.

Q. Isn't it a fact that if I had a battery in my garage with jumper cables that I would qualify to consider myself as having a Start-a-Car Unit? A. I suppose if you could start a car with a battery and a series of jumper cables.

Q. Number two, a fuel pump tester, What is that? A. I'm not complete familiar with what a fuel [T. 93] pump tester is.

Q. I submit to you that's a compression gauge which anyone could buy in a hardware store or a motor parts center for about two dollars and ninety-eight cents.

(Mr. Noonberg) Objection, the witness stated he's not familiar with it.

(Court) Sustain the objection.

Q. What's a brake shop combination? A. I'm not completely familiar with a brake shop combination. I can – I can assume that this is a combination lathe, bearing press and all the other equipment needed to repair, grind and replace brakes.

Q. You're assuming but you don't know, is that your testimony? A. Mr. Woodstock, I don't get involved with the day-to-day details so there would be some equipment on the page which I would not be absolutely familiar with.

Q. You're not familiar with the day-to-day details. I believe you previously testified that the purpose of company run operations is to be able to gauge the acceptance of certain products and services by the company owned and operated stations. How, may I ask you, can you determine that if you're not familiar with the equipment itself and what it's supposed to do?

[T. 94] (Mr. Noonberg) Objection, it's a mischaracterization of the witness' testimony, Your Honor.

(Court) Sustain the objection.

Q. Number six, an acetylene gas welding unit. What is that? A. This is a unit powered by acetylene that's used for welding purposes.

Q. Number seven is basically the same thing, isn't it, it's an ARC welding set? A. Yes.

Q. Number eleven, parts cleaner-air operated. A. I'm sorry, what was –

Q. Number eleven. A. I'm not familiar with that piece of equipment.

Q. How about number fifteen? A. I'm not completely familiar with that piece of equipment.

Q. What does it purport to be, sir? A. A brake stool.

Q. It's a stool, isn't it? A. Yes.

Q. That people sit on? A. I would assume so.

(Mr. Noonberg) Objection.

[T. 95] (Court) In this case, that brakes sit on it, I suppose.

Q. Number twenty-one, an inspection mirror. Are you familiar with what an inspection mirror is? A. No, I'm not.

Q. A headlight tester? Are you familiar with what a headlight tester is? A. Yes.

Q. Have you ever seen them in any other gasoline station? A. I've seen it in some service stations with repair capabilities.

Q. Now you have knowledge of what the competition is out there for Exxon, am I correct in assuming that? A. I have a general knowledge of what the competition is, yes.

Q. Would you say that – would it be your testimony that out of these twenty-five items listed that at least eighty percent or more is standard equipment in any mechanical shop? A. I have no way of knowing that, Mr. Woodstock.

Q. Let me ask you about monitoring sales and types of gasoline and oil. How does the typical dealer-lessee pay his rent to Exxon? [T. 96] A. Rent is collected in a number of ways. The rents that Exxon collects represents the income potential of the store to the dealer. Sometimes this is collected on a gallonage basis for ease of collection. Sometimes on a flat basis.

Q. Do most Exxon dealers one way or another for whatever reason report their gallonage sales to Exxon? A. We have a record of the product purchased from Exxon, yes.

Q. In other words they report their sales of regular gasoline, is that correct? A. They do not report their sales.

Q. Excuse me, then if a man is paying his rent on a per gallon basis. A. This is per gallon purchase from Exxon.

Q. Okay, per gallon purchase –

(Court) Excuse me, Mr. Harvin, you've a little too close to the microphone. A. Sorry, sir.

(Court) And I think that's causing the problem.

Q. So Exxon does have direct information as to how many gallons of each grade of gasoline each dealer would be purchasing, is that correct? [T. 97] A. Mr. Woodstock, we deliver the gasoline to the dealer, so the answer is yes.

Q. Would it be fair to say then that Exxon would know what the current demand would be for the various grades of gasoline just by reviewing what they're selling? A. Yes, we – we determine what the current demand is by grade ratio based on what the dealers buy from us.

Q. Isn't that true with motor oil, also? A. Yes.

Q. And lubricants? A. Yes.

Q. To a certain – A. To a lesser extent with lubricants.

Q. And to a certain extent, TBA? A. No.

Q. You have no records of what dealers buy as far as TBA is concerned? A. We have records of what the dealers buy from Exxon, sir.

Q. Right. It is safe to say that gives you an estimate as to what the market is demanding, is that correct? A. I think this is a rather-rather poor estimate when it comes to TBA.

Q. Not TBA, I'm talking about now primarily gasoline [T. 98] and motor oil. A. Yes, this gives us a good estimate of what the Exxon stores are selling.

* * *

[T. 103] A. Our retail profits are calculated on the same basis, that is, we take the retail price of gasoline less the dealer tank wagon price of gasoline and that is our retail margin on a gallon of gasoline.

Q. You utilize the dealer tank wagon figure on your own company owned and operated stations for the purposes of calculating profit and loss? A. Yes.

Q. One more thing, in your direct testimony I believe you gave three primary reasons for Exxon to have company operated stations. The second one I believe was company operations enhance the dealer operation in

general. I wonder if you could explain that in a little more detail how that is supposed to work. A. The thought behind that statement, Mr. Woodstock, was that as you recall earlier I said that Exxon participates in what it believes are the total market segmentation, that is the full span of consumer preferences and this ranges from full service all the way through the car care; and in our judgment there is some synergistic effect and which is passed on to the Exxon dealer in terms of image that's built on a particular marketplace by serving all the needs of the consumer. The consumer can come to an Exxon branded [T. 104] or an Alert store for just about all of his automotive needs.

Q. Prior to the implementation of Exxon company owned and operated facilities, did Exxon engage in monitoring customer preferences for their products? A. Ah, Mr. Woodstock, to some degree Exxon's been involved in company operations since 1924.

Q. That didn't answer my question. A. Ah, we have no direct ability. We have no face-to-face contact when a customer is dealing through a dealer operated store. This is the reason we think it is very important so we get some feel for what the consumer is thinking and what his preferences are by operating some stores on a company operated basis.

Q. Okay, I believe you testified you are familiar with the competitors out there of Exxon, is that correct? A. I don't recall the specific statement. I have a general feel for what the marketplace is in Maryland, yes.

Q. Are you familiar with the various actors in this marketplace? A. To some degree, yes, sir.

Q. Would you – would it be your testimony that Exxon was the actor that initiated the concept of self service? A. No, sir, it would not be.

[T. 105] Q. Do you know who did? A. I'm not sure

who did in the State of Maryland. I think that the concept generally was used first by the private brand sector of the market.

Q. Is it still used by the private sector of the market? A. To some degree, yes.

Q. How about the gas oil facility? Was Exxon the first to introduce that type of marketing? A. Ah –

Q. They do have one in Maryland. It's up where I live. A. Was Exxon the first to introduce –

Q. Yes. A. – that concept? I don't know.

Q. I believe you testified on direct that in 1972 if we couldn't operate Alert ourselves, we would not have entered the Maryland market, is that correct? A. Ah, yes.

Q. How do you know that? A. There are anti-trust laws which would prohibit Exxon from being able to control the price of gasoline and the success of the Alert operation depends upon that store being price competitive with the private brand sector of the [T. 106] market. It was a test at that time and if we could not have had a controlled test, we would not have initiated the test at all.

Q. The anti-trust laws prohibit you from setting the price, those antitrust laws still exist today. I don't understand your statement. A. I'm sorry, I thought you were referring to the dealer operation.

Q. I'm talking about in 1972 if we couldn't operate Alert ourselves, we wouldn't have entered the Maryland market. I believe that's what you said on direct, I asked you how you know that. Was the Board of Directors of Exxon voted on that? A. Not to my knowledge.

Q. Then you had no basis for the testimony, did you? It was your opinion.

(Mr. Noonberg) Objection.

(Court) Well, he can say whether he had basis or not.

A. That – that is my opinion, ah, based on what I

know are the both federal and anti-trust pricing laws when we're dealing –

Q. I'm interested in knowing what you know about Exxon's corporate decision regarding the marketing of a [T. 107] secondary brand under the title Alert. You made a positive statement that you wouldn't have come in in 1972 if you couldn't direct operate. I'm asking you did you have any basis of first hand knowledge that that was a decision made by Exxon Corporation. A. I have no firsthand knowledge but I believe that would have been the decision.

Q. Exxon's voluntary allocation formula, can you tell me when that was implemented. A. It was implemented in July, 1973.

Q. And would you just run me through again, if you please, how that system was established? What went into it? A. Okay, first we took the available supply. Then that available supply was divided between class of customers based on historical division and then each customer within the class, ah, the gasoline allocation formula took two years of historical prior years sales or purchases from Exxon as the case may be and adjusted that for recent trends to reflect things like opening of new roads, changes in demographic data, et cetera. So each customer then was assigned an allocation volume for each month while we were under voluntary allocation. There was no difference in the system between dealer operated stores and company operated stores.

[T. 108] Q. I believe you characterized it in your direct examination as being a – performed on a fair and equitable basis. A. Yes.

Q. So it's your testimony that by factoring in two years of historical sales making the adjustments based on demographic changes and these other things that you've just mentioned that that constitutes fair and

equitable basis? A. Ah, that's – that's not what I said, sir. I said that it was adjusted for recent trends for such things.

Q. But that constitutes a fair and equitable basis in your opinion? A. In my opinion, yes, sir.

Q. What happens with a location that doesn't have a two year historical history? A. Ah, just taking an example of a new location, whether it be dealer operated or company operated, which did not have a historical base, we book calculated what a historical base would be. Now let me give you an idea about that. Let's suppose a station opened in June, 1972 which would indicate that the store had no full record for 1972. Then we would have used seasonals based on the actual purchases of that station to calculate what the [T. 109] first six months' experience would be and that some methodology was used no matter whether the store was operated on company basis or whether the store was operated on a dealer basis.

Q. Granted that, did it take into consideration ideal weather conditions? A. No, it did not.

Q. Assume if you will particular station in 1971 or '72 whenever Agnes hit us, that his gallonage dropped off during that particular month which would affect the quarter and his seasonal sales, if he didn't bring that up to Exxon, was that considered one of the factorings, factoring-ins to adjust his volume? Or his allocation, excuse me. A. Depending on when that – that set of circumstances was. If it was in the time frame that was used to adjust for recent trends, yes, that would have been recognized.

Q. I think Agnes was here during that period. A. I don't know.

Q. Aside from that, is it your testimony then that Exxon had firsthand information as to every change affecting every station such as road repair, broken water mains, grand openings of new supermarkets two blocks

away , everything that would perhaps contribute to an increase or decrease in gallonage on a sporadic basis? [T. 110] A. That's not what I'm indicating at all.

Q. Explain to me again if you will what the factors are that they're factoring in to making these adjustments to the historical base figure. A. I don't remember precisely what period of time was used in making adjustments, but let's suppose the years were 1971, 1972. Then we took the last six months of experience and factored it on that basis, not looking at each station individually but looking at what the prior, the most recent history had been on that station.

Q. Okay, a new location comes on – on stream, it's a car care center or company owned and operated facility. Do most of those have as part of the development and the location a projected volume? A. Yes, they do.

Q. And how is that figure arrived at? A. Ah, this is a model that's been developed by Exxon over a number of years which is based on traffic counts, based on demographic data would estimate what that store is capable of doing in terms of motor gasoline volume.

Q. Would that figure include the same considerations as those that we were just speaking about in establishing voluntary allocation amounts to those existing stations? A. If your question is was that volume predictor [T. 111] used, it was used in some cases where the store was new and we didn't have any prior experiences, yes.

Q. And he was given a percentage of that projection or was he given a hundred percent of it? A. Well, the supply factor itself varied over the period where Exxon was on voluntary allocation.

Q. Varied – A. But the same percentage was given all customers.

* * *

[T. 112] REDIRECT EXAMINATION

BY MR. NOONBERG:

Q. Just a couple questions, Mr. Harvin. You used the term surplussed out of the system. Would you just explain what the term means? A. This is divestment of uneconomical stations, stations that are uneconomical to the dealer and also to Exxon.

Q. You indicated that Exxon had one self service station in the State of Maryland, is that correct? A. Yes, sir, that's correct.

Q. Did – does Exxon have plans for additional self service stations? A. We would like to have additional self service stations in Maryland, but because of the uncertainty of the statute, we have not made any moves in that direction at all.

(Mr. Noonberg) No further questions.

(T. 118) JACK WILLIAM CHANDLER.

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) Jack William Chandler, 1221 East Main Street, Chattanooga, Tennessee.

DIRECT EXAMINATION

By Mr. Preston:

Q. Mr. Chandler, you are the President of the Kayo Oil Company, is that correct? A. That's correct.

Q. How long have you held the office of president of Kayo, sir? A. Well, I've been president of Kayo since 1965, ten years.

Q. I would like, if I may, to go back in your own history and for you briefly to tell the court of your education, background and your employment experience before you went with either Kayo or its predecessor company, Kendall. A. Well, I'm a native of Chattanooga, Tennessee, attended the Chattanooga schools; attended the University of Tennessee at Chattanooga, was a business administration major, after leaving school I went to work for the Tennessee Valley Authority in the maps and surveys division as a cartographic engineer aide. At the advent of World War II, (T. 119) I got an appointment as an aviation cadet and was a pilot, flight instructor with the U.S. Air Force for five years, retired from the Reserve with a rank of major. After World War II, I did not return to the Tennessee Valley Authority but went to work for the Hotpoint Appliance Company as the general manager of distributorship of the eastern part of the State of Tennessee. I stayed with them for about eight years and I had known Mr. Kendall through his son, Paul. He was also in the Air Force and we had both of us been Chattanooga neighbors. Mr. Kendall had embarked

on a rather rapid—had began to embark on a rapid expansion program in 1955. At that time he had, well, I think ninety-nine service stations in about five states.

Q. Did you—tell the court when you—you went with Kendall in what year? A. In August of 1955.

Q. All right, sir, proceed. A. Which is twenty years ago.

Q. All right. A. I went to work for Mr. Kendall and his son, Paul, and my duties at that time were, well, many. I, of course, was a pilot. We had acquired a twin engine airplane. Paul Kendall, his son, was also a pilot. He flew. We, ah, I'd say embarked on an expansion program. My duties then were (T. 120) to look for real estate locations, to get permits to build, to supervise construction of the stations, to see that they were built, to plan sales promotions, to operate and staff them. In the meantime I sold airplanes because we had a aircraft dealership.

Q. How long did the aircraft dealership last? A. Oh, about three years until we got about four or five planes, two of them wholesale. The point I'm making is we all wore many hats. We didn't just do any one specific thing.

Q. Let me interrupt you if I may. By 1959 when Continental acquired Kayo, what were your duties at that time? A. Well, by that time we had—we'd gone from about ninety-nine stations up to about a hundred and sixty and the company had been divided up into two geographic, we call them divisions. Well, I was one of the division managers along with one of the older employees who is now executive vice president.

Q. And now that you have become the President of Kayo for the past ten years, describe to the court during the past ten years what your general duties have been as president? A. Well, of course, as president, of course, my—I (T. 121) have full responsibility as chief executive

officer, all the policies, plans, programs, all phases of the operation, pricing.

Q. Are you thoroughly familiar with Kayo's marketing practices throughout the country? A. Absolutely.

Q. And do you feel that by virtue of your background in the industry that you are familiar with the marketing of petroleum products retail generally throughout the country? A. Generally, certainly with respect to the private brand segment.

Q. When was Kendall Oil Company founded? A. Well, as you stated in your opening remarks, it was founded in 1940. Mr. Kendall was a Pure Oil jobber and at that time he even then could foresee that there was a need in the marketplace for another method for the motoring public to buy gasoline. So he branched out into a low price—as a low price marketer.

Q. Did he always use the name Kayo? A. Just for a brief time he used the word Grayhound but then he went to the word Kayo, which, of course, is a phonic sound of the initials K period O period. It was like Esso then. So I would say in about 1942 he took the (T. 122) brand name Kayo. At that time he only had five or six stations. It would be interesting to note Mr. Kendall was one of the real pioneers and innovators in this. Back then you didn't have highway trans—gasoline transports. All gasoline was transported from refineries in railroad tank cars and there were some stations especially our home office where we are right now located in Chattanooga which is on a spur track. They would get a gasoline—a tank car, a railroad tank car, the railroad would deliver to the siding where it was sometimes connected up actually to a pump, like it went direct from a tank car direct into the tank of the consumer. That's where you get the name of spur which is one of the recognized leaders in the private brand and it's a trackside tank car and so on; but even

then it showed that Mr. Kendall had the foresight to operate a discounted private brand operation.

Q. During the history of the Kendall Oil Company before it was acquired by Continental in 1959, did it ever have any dealer stations? A. Never, never.

Q. All stations then have always been—A. Always been—

Q. —operated on what basis? A. Fully controlled which is really absolutely (T. 123) necess—absolute necessity.

Q. We will come to that in a moment, but just to take us right up to the present time, how many stations does Kayo have at this time? Nationally? A. Well, nationally we have six hundred and ten. They are based east of the Mississippi River, but not including the New England states. We're in eighteen states.

Q. How many employees does Kayo employ nationally? A. Total approximately three thousand.

Q. Do you know approximately what the national sales are in dollars and gallons of gasoline for Kayo? A. Oh, approximately in dollars we're over—gross sales are over two hundred million annually and volume would be somewhat over four hundred and fifty million gallons.

Q. And all of those stations, all sixteen hundred—six hundred and ten are operated, company operated, is that correct? A. That's correct, all company operated, fully controlled.

Q. What type of a marketer of gasoline is Kayo Oil Company, that is, Mr. Noonberg in his opening identified private brand marketers, major brand marketers. Would you identify within what segment of the market you operate? (T. 124) A. Kayo is a private brand or is referred to as low cost, low price, private brand, opposite of Exxon.

Q. Does Kayo operate on its own any terminals, any refineries or have any production capacity? A. Kayo has no production, refining, transports. They do no blending, compounding or anything with any of the products.

Q. I'd like, Mr. Chandler, referring on your experience in the industry, if you would tell Judge Childs for the record here just what a private brand dealer and marketer of gasoline is, how they operate and—

(Mr. Woodstock) Objection.

Q. And in doing this distinguish them from a major brand marketer.

(Mr. Woodstock) Objection, Your Honor, I—

(Court) What's the objection, Mr.—

(Mr. Woodstock) The objection is I think he can characterize the Kayo method of operation but certainly not all private brand dealers which is what the question implies in his seeking an answer to it.

(Court) Well, he says that he's a private brand marketer so I suppose if he goes ahead and describes what he does that will take care of it.

Q. Go ahead, Mr.— (T. 125) A. Well, the private brand operation, of course, is as been stated in the opening remark—

Q. I want you to do this distinguishing your kind of station, the Kayo station, from the major brand station. A. All right. Private brand station as you drive up to it, you see probably a large price sign, in some cases you don't even see a brand name. The brand name is not important. The price is important. You go into—you drive in in most cases it is a secondary location as far as cost or the major brand station usually is a prime location, corner sites, first off the interstates and so forth. The private brand operators usually go for the middle of the block, for example, or maybe half a mile or so, a secondary off the interstates. When you go into a

private brand operation such as Kayo you have no service bays or facilities for mechanical work, only—use a limited amount of space on a driveway, pumps and probably an attendant there with a changer on his belt or someone to take the change. You contrast that with the major brand marketer you have, of course, the full service as also been numerated, the credit cards, which private branders generally do not have.

Q. Do you have any kind—does Kayo have any kind of credit? (T. 126) A. No.

Q. Cash only at all stations? A. Cash only.

Q. All right, sir. Go ahead. A. You have a brand acceptance surely in the majors, major stations. You have a higher level of employee and I don't mean to downgrade the private brand.

Q. On employees, Mr. Chandler, tell the court both from a standpoint of the number of employees and the type of employees, that is, both quantity and quality of employees, the kind of employees that Kayo both in number and type employees as opposed to the major brand station. A. Well, we have an average of about four employees per station, these employees require no special training. They can be—as long as they've got average intelligence, there isn't any specialty—special experience required and I would contrast that with the fact that major brand station as I see it you'd have to have a much higher level or skill of employee.

Q. Insofar as the number of employees, how many employees do you have to have in a Kayo station for any one shift related to number of gallons and explain that. A. Well, you generally can expect to have—naturally you've got to have one person per shift. In a higher (T. 127) volume station, there are occasions where you would need two employees per shift. Generally anything

over fifty thousand gallons per month, the station over fifty thousand gallons per month, would require two stations per shift—two employees per shift, excuse me.

Q. How does that compare with the number of employees that are required in major brand full service stations? A. Well, I would imagine it would be considerably less since they would have to have people to perform all these services we've mentioned.

Q. When you go—when the customer comes into the station, the Kayo station, other than get gasoline, does the attendant do anything else besides put gas in the car? A. No, no, that's all.

Q. Since most—since all of us go into stations from time to time, do they raise the hood and wipe the windshields and mirrors? A. Well, if you ask them, they probably would, but we don't have facilities for changing oil. You could add on the oil but we really discourage that because this is a fast in, fast out operation. If a customer wanted that kind of service, I think he'd go to a major brand station.

Q. Do you, for instance, offer road maps? A. No.

(T. 128) Q. Do you sell tires, batteries and accessories? A. No.

Q. Do you sell any product other than gasoline in your stations? If there are any related to the automobile, tell us what they are. A. Well, of course, we sell automatic transmission fluid, brake fluid, STP, for example, but this is strictly carry out or add on or the customer can get this at a Kayo station, he can take it or leave it. We don't push it.

Q. What kind of hours is a Kayo station, private brand station, open as compared to the hours that major brand stations are opened? A. Well, a private brander such as Kayo generally stay open as I say three hundred sixty-five days a year and sixteen to eighteen hours a day. I think

you'll find very few of them open twenty-four hours a day now.

Q. How much does the Kayo Oil Company spend nationally in advertising? A. Nothing, zero.

Q. Does Kayo operate either in Maryland or anywhere in the country service stations as opposed to gasoline sales stations? A. The ser—the Kayo stations, or they're really filling stations that we have in Maryland are typical of the stations that we (T. 129) have throughout the system in all other states.

Q. For the record and benefit of the court, I'd like to show you—these are two sets of photographs which Mr. Woodstock has seen and first tell us what kind of station this one is, right there. A. This is in LaVale, Maryland. This is a station that was built new from the ground up. This is a typical Kayo station with four pumps and it has just a small shell here, a little covered place for the attendant or manager to count his money. It has a small warehouse, about the size ten by ten and two very small rest rooms. That's the extent of the facilities.

Q. Is that typical of the stations in Maryland and elsewhere that— A. Yes, sir, this is typical—

Q. —are built from the ground up? A. This is typical of the station that we have everywhere.

Q. Now you haven't built all of your stations, have you? A. No.

Q. You have purchased—

(Mr. Preston) We'll offer this, if we may, as Continental's exhibit one, Your Honor.

(T. 130) (Court) All right.

(Clerk) Exhibit two.

(Sheet of photographs filed herewith as plaintiffs' Exhibit No. 2A).

Q. And some of those that you have acquired were already used as stations, is that right? A. This is a—this is

a station in Hagerstown, Maryland that was an old Pure Oil station which was converted to a private brand Kayo operation. We closed in the lube bay areas and this is one where we would use for storage and as you mentioned the office for a supervisor.

(Mr. Preston) What would this be, two?

(Clerk) 2b.

(Mr. Preston) 2b.

(Sheet of photographs filed herewith as plaintiffs' Exhibit No. 2B).

(Mr. Preston) All right to proceed, Judge Childs?

(Court) Yes, sir.

Q. Mr. Chandler, from a standpoint of supervisory organization or personnel above the actual stations, what does Kayo maintain? A. Well, we have really a simplified, streamlined organization structure. Above the station we have a field (T. 131) supervisor, we call him a district supervisor, one for each seven or eight stations. So that would mean we have eighty district supervisors and eighty districts. Each district has one.

Q. Now let's stay with this field supervisor who has seven or eight stations. Does he have an office? From where does he operate? A. Well, he has an office usually in one of these closed lube bays or in the back of one of the service stations in this district.

Q. All right, go ahead. A. I might add that these field supervisors have without exception all been promoted from a—usually a driveway attendant so they are very familiar with the operation of the station.

Q. Go ahead, above the field supervisor. A. Above the field supervisor for these eighty districts that we have spread out through eighteen states, we have about sixteen areas. These are divided in areas that are supervised by an area manager. Now they, too, have come up from the ranks as attendants or manager without exception. They

have—also have an office somewhere among their, oh, they have—somewhere, maybe alongside one of the district supervisors in one of the closed lube (T. 132) bays but they have no office personnel, no staff, no secretary. They—oh, we allow them to have little adding machines so they can audit the station or a pocket computer maybe is all the equipment they have. No typewriter. No need for it.

Q. Does Kayo rent any offices other than the home office in Chattanooga? A. We rent no office and the one in Chattanooga is the original one founded by Mr. Kendall when he came there in early 1950 in an old converted Butler warehouse building.

Q. And above the district supervisors, what management? A. That's all we have in the field. Outside of Chattanooga it's the only organization we have, the area managers, the supervisors and a station manager and personnel. In the office we have four division managers. They're based in Chattanooga and there, you see the area managers report to—some eight or—four area managers would report to one division manager in Chattanooga. Now above that we have two vice presidents of operations and above that one executive vice president and myself. It might be interesting to note that all of the personnel of Kayo that I've talked about, the operations people, executive vice president, the two vice presidents of operations, (T. 133) division managers, all started as attendants on the driveway. I guess I would be the exception, but I have worked on the driveway. In fact I've gotten some—there've been times when I've had to when a station had been abandoned or somethin' when I've been out on an inspection trip and then I'd go back to the office and get a letter from some customer complaining about that seedy character out there that needed a shave, for example.

Q. Mr. Chandler, at what price does Kayo sell its gas at retail generally speaking through your experience in the company in comparison to the major brand dealer?

(Mr. Woodstock) Objection. Your Honor, the category of what constitutes a major brand dealer—

(Court) Mr. Woodstock, are you having problems standing, sir?

(Mr. Woodstock) Excuse me. The definition of what constitutes a major brand station is quite a contention. No matter what source you refer to that reports these types of figures, they include various actors within the group or not within the group and we would ask perhaps that if they want to pursue this line of questioning that they refer to the listing of the participants in the Maryland market provided in the pretrial order at page 13 as opposed to this broad generalization.

(T. 134) (Court) Mr. Preston, do you want to speak to that?

(Mr. Preston) May I see the pretrial order?

Q. First of all, tell us—this is the pretrial order. You're going to have to look at it, right. Now tell us what you mean when you say a major brand dealer. What do you mean by that? Tell the court. A. Well, a major brand dealer would be one who has the branded, accepted brand, nationally advertised accepted brand and who offers as we described here the full service, full range of the retail service.

Q. Can you give some examples of the brands that are nationally advertised and kind of dealers that offer full service? A. Exxon, Gulf, Shell, Texaco, I don't want to hurt anybody's feelings here. These are national—

Q. They're examples of the major brands that you're talking about, is that right? A. Sure, right.

Q. All right, now with relation to that type of major brand dealer who you've mentioned at what price has

Kayo generally been able to sell its gas with relation to that price? A. Well, historically Kayo and other private branders (T. 135) have sold three to four cents a gallon under these major brand dealers mentioned.

Q. Why are you able to sell your price or sell your gas at three to four, five cents less than the major brand dealer? A. Well, obviously all of these services that we've talked about are very expensive, the road maps, the nationally advertising, the lube bays, the higher skilled personnel and so forth, they're a lot more expensive and they cost a lot more to operate a major brand than it would to operate a private brand. So this savings over the years that we have effected a bare bones operation we can pass it on to the consumer and that's how we—the only way we can survive since we do not have a brand acceptance. We appeal to the people that want a lower price and do not want the frills.

Q. Mr. Chandler, at the time of the pretrial order the exhibit that it has with it it lists sixteen Kayo locations. I believe that there are now how many Kayo? A. Fourteen.

Q. Fourteen. A. Fourteen in Maryland. Six in Baltimore City and eight in the outlying areas.

Q. And from time to time you have opened a total of nineteen stations in Maryland since '64, is that right? (T. 136) A. Since 1964 right.

Q. And you are now down to fourteen and this is a list of the nineteen stations taken from the answers to interrogatories, which I will offer, you needn't identify it, I've shown it to Mr. Woodstock. A. Right, yes.

Q. And it merely says closed or open on it and the date the station was opened and the location.

(Mr. Preston) It will be Continental's 2C, if that's—

(Clerk) It will be Number 3.

(List of Continental stations filed herewith as Plaintiffs' Exhibit #3).

Q. Mr. Chandler, the gasoline that Kayo sells in Maryland is obtained where? A. Well, all the gasoline sold at retail to Kayo stations in Maryland have been obtained from Continental's terminal in Baltimore and delivered to the station in either Continental transports or in rare occa—exceptions would be by common carrier. This product at the Baltimore terminal comes there from Continental's Lake Charles Refinery through the Colonial Pipeline.

* * *

(T. 141) Q. Mr. Chandler, you said that Kayo Oil Company first came to the State of Maryland in 1964. A. That's right.

Q. I ask you, you were president of the company at that time? A. In 1964 I was vice president of operation. I became president a year later.

Q. You're right. I stand corrected. Would Kayo have come to Maryland in 1964 if there would have been a law in Maryland that you could not have operated company operated stations in Maryland then? A. No way. No, sir. We could not have operated without company operated stations.

Q. Can you explain that any more to the court? A. Well, in order to maintain our price posture which is a low price marketer, you've got to have full (T. 142) control of all your operations and the most important control of all is control of your retail price so without that we just couldn't operate.

Q. All right. Are you familiar with Paragraphs B and C of Chapter 854 of the Laws of Maryland of 1974? A. Yes, sir.

Q. And directing your attention to them, if the—if that law should become effective, what will the Kayo Oil Company do from a competitive standpoint with regard to its operations here in Maryland? A. Well, of course,

we've given this a lot of thought, naturally with having this kind of investment in Maryland. We couldn't operate with dealers because we don't have the organization or the structure or the expertise. We don't have the know-how to recruit, train and organize dealers or the staff necessary to support them. If we were to—even if we were to try, we would have to make such a substantial investment to change those Kayo stations shown in the pictures here that there's just no way those stations could be converted to the full service types. The amount of investment would be—make it economically unfeasible. We just could not operate any other way than we are now with full control because with dealers you would have to increase the cost of your gasoline to make up the increased mar—marketing (T. 143) costs would have to be passed on and then to sell Kayo alongside the Exxon, Shell, Texaco, Gulf, Arco and so forth would be impossible because we don't have the brand acceptance and it would take years and years to get it.

Q. Do the same factors that you described a moment ago with relation to 1964 and the necessity of controlling the price still persist today? A. Absolutely it still persists today.

Q. What will Kayo do then if the law becomes effective, Mr. Chandler? A. Well, I see no alternative but to close the stations, remove the equipment and put them up for disposition and we'll just leave the Maryland market.

(Mr. Preston) That's all I have. Your witness.

CROSS EXAMINATION

By Mr. Woodstock:

* * *

(T. 144) Q. I'm trying to get something straight here. What's the nature of Kayo as an entity today? Is it a

separate corporation? A. Yeah, Kayo is a separate corporation, of course, we're a wholly owned subsidiary. We're a Delaware corporation, wholly owned subsidiary of Continental Oil Company.

Q. Do you have a separate board of directors? A. Oh, yes, we have a separate board of directors. We're completely autonomous in our decisions and everything. Of course, we—being a subsidiary we—

Q. Have you issued stock of your own? A. No, no.

Q. Well, ultimately then— A. Well, Continental—

Q. —board of directors that—

(Mr. Preston) Let him answer the question.

A. Well, Continental primarily, of course, owns the stock in Kayo. Yeah, there is a wholly owned subsidiary. They own the stock in Kayo one hundred percent.

Q. Well, then if as in most corporations the board of directors answers to anyone they ultimately answer to the stock holders. Would you agree with that? A. Well, so I—there's no question we—I answer to Continental Oil Company.

Q. And if Continental come into today because of the (T. 145) nature of their ownership of—outright ownership of Kayo and replaced your board of directors by a vote of whatever would be necessary for them to do that, there's nothing Kayo Oil could do about it— A. Well—

Q. —the board of directors would cease to operate. A. That's right. They own the stock one hundred percent. That would happen in any corporation.

Q. Do you know for a fact that if this law is upheld that the Board of Directors of Continental Oil have already voted and come to the conclusion that they will totally withdraw from the Maryland market? A. You talking about Continental?

Q. Or was that— A. Continental's Board of Directors?

Q. Yes. A. No, I don't—I don't know that they've made that decision.

Q. Kayo's Board of Directors have made that decision? A. Well, ah, I'm on the Board of Directors and my two operating vice presidents are on the Board and the executive vice president so certainly we've made that decision.

Q. Would that decision – (T. 146) A. Not formally, not formally.

Q. Would that decision be just implemented after your vote or would it be some sort of procedure by which the Board of Directors of Kayo would clear it with Continental? A. I'm absolutely free and this has been a great relation, I'm absolutely free to open stations, close stations as I deem fit. Continental has never you might say second guessed me on that.

Q. Have you ever opened or closed all the stations in any given state? A. No, I haven't done that before.

Q. So you've never tested then– A. No, I–

Q. –the limits of your autonomy? A. That's right, I didn't test it. I'm sure they wouldn't want me to operate stations that I consider unprofitable.

Q. You think they might want you to explore all possibilities? A. Well, I'm sure I would.

* * *

(T. 159) THEODORE LEVITT,

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) Theodore Levitt, 43 Crevice Lane, Belmont, Massachusetts.

(Clerk) How is your last name spelled?

(Witness) L E V I T T.

DIRECT EXAMINATION

By Mr. Noonberg:

Q. Professor Levitt, what position do you now hold? A. I'm Professor of Business Administration at the Harvard University Graduate School of Business Administration.

Q. And for how long have you held that position? A. I've held that position since 1965.

Q. Could you give us a brief summary of your educational background, sir? A. I received a bachelor's degree from Antioch College in economics, PHD in economics from Ohio State University.

Q. Could you give us a brief statement of the various positions that you've held in this field? A. Upon my graduation in 1951 from Ohio State University, I was a full-time consultant to the Ohio AFL-CIO Council for a period of approximately six months, after which I became assistant professor of economics at University of (T. 160) North Dakota in 1952, position I occupied until the spring of – the end of the spring of 1955. In 1955 through the summer of 1959 I was an economic consultant in Chicago occupied almost entirely with matters in the petroleum industry. In 1969 (1959?) I went to Harvard University as lecturer of business administration and then became professor of business administration in 1965 as I told you.

Q. What course have you taught at the Harvard School of Business Administration? A. I've taught the course, the first year graduate course in marketing at the Harvard–the Business School. I for a period of three years during my tenure there was Chairman of the first year marketing course, for a number of years I taught a projects course which was called Creative Marketing Strategy, a course in which groups of students did and continue to do although I don't teach it at the moment project work

analyzing business problems for sponsoring business corporations, for a period of three years I taught the marketing course, the advanced management program which is a course for senior executives for industry around the world that come to Harvard University. I am currently teaching a similar course in marketing for a middle management program of executives from corporations around the world and the United States.

(T. 161) Q. Professor Levitt, have you—have any of your writings been published? A. Yes.

Q. Can you give us a summary of some of the more significant writings that you've had published? A. I've authored five books on marketing and business subjects and been the co-author of a sixth. I've published well over a hundred articles on marketing, business policy and economic matters. One of my books, INNOVATION IN MARKETING, was—was cited as one of the best business books of the years by the Academy of Management. Four of my articles were, which were published in HARVARD BUSINESS REVIEW, were—received the annual McKinsey award for the best article in the HARVARD BUSINESS REVIEW for the year. I am—articles have been published in a wide range of journals, from business journals, professional journals in economics and public affairs.

Q. Have you received any awards in the field of economics or business management other than the ones that you've just mentioned? A. In 1968 I received the Charles Coolidge Parlin Award as the marketing man of the year and in '69 or '70, I've forgotten the exact date, one of my publications and some of my work was cited as—under—I received—I guess it (T. 162) was I received the Hancock Award for excellence in business publications and business journals.

Q. By the way, Professor Levitt, have you ever appeared in court as an expert witness before? A. Never.

Q. Dr. Levitt, after you were retained by Exxon and Continental in this case, what work did you do to prepare yourself for your testimony this morning? A. I did—well, first of all, I did considerable work which I co—I will explain. With a twenty year background in the petroleum industry, I was reasonably able, I thought, to focus that work to the particular situation given the background that I had in research and consulting in that industry. Specifically I spent considerable time reviewing the facts of retail marketing and petroleum product distribution in Maryland in relating those to facts as I knew them on the basis of my own studies and familiarity with the industry elsewhere. I visited and spent a total of three days travelling in the Maryland market, specifically looking at the configuration of retail stations, the type of retail stations trying to examine the understanding of the uniqueness if there was any or the character of retail operations in Maryland. Most of the—two of those three days I spent in the greater Baltimore metropolitan area and the other time (T. 163) I was in the Eastern Shore in Cambridge. I had discussions with six members of the Exxon marketing organization at levels dealing with Mr. Harvin's level, who is, you know, is regional manager here and levels below that down to direct supervisors of retail operations. I spoke directly I think to ten to twelve operators of retail service stations, some dealers, some company operated operators including those of a variety of brands. I spent in addition to the time reviewing the background considerable amount of time—this all began approximately last fall, considerable amount of time reviewing the various documents that were drawn up by the counsel for Kayo and for Exxon, consulting with them regarding the content of some of those materials

and the meaning particularly of the economic and marketing facts and dynamics that were referred to in that documentation.

Q. In connection with the consulting work that you've done, Professor Levitt, could you give us some of the subject matter areas that you've done consulting work in? A. I've done consulting work primarily in three major areas, functional areas, one dealing with marketing problems business organizations, petroleum industry and others, I would—my range of work insofar as industries are concerned involves a wide range of companies in retailing, like Montgomery Ward, for example, in the oil business, in steel, in (T. 164) aluminum, in industrial chemicals, in a whole range of consumer products from toiletries to food products to consumer soft goods, like apparel, involving numerous companies in this country and abroad, electronics, with a heavy focus on marketing problems and a great variety of issues that are involved, pricing, distribution, trade policies, advertising, promotion, sales organization, staff work, market research. The second major functional area has been in areas of business policy which is an area or at least the conventional taxonomy is that business policy deals with all those things which are concerned with the strategies and tactics of a company that involves things—that involve all functional areas, such that policies may have to do with where we should locate our plants and why we would want to locate it in x location versus y location with respect to the question of how that affects particular competitive strengths or opportunities for a firm dealing with financial policies as related to the whole organization dealing with problems of executive development, executive placement, selection of executives for high-ranking positions, dealing with government relations. And the third functional area that I have been involved in have

dealt with government relations, particularly in the antitrust and federal trade area and advising firms regarding their practices as they relate to the law, though I'm not a lawyer pretty (T. 165) obviously.

Q. Professor Levitt, directing your attention to the petroleum industry, can you give us just some of the areas in which you've been directly involved in petroleum industry problems? A. My first involvement with the petroleum industry began in 1955 and that involved originally making studies of the retail configuration of a particular major brand, its retail practices as they revealed themselves in locational activities of stations, the type of stations, the way in which the stations were operated, the kind of training they gave a dealer. Where the object of the studies was to help to get firms and to get the particular client some sort of an indication of what the reality of what was going on and how the retail was from the vantage point of someone who knew nothing about the petroleum industry and who, however, had sufficient training in economics to be able to advise them as to the meaning of what went on with respect to certain anti-trust and Federal Trade Commission issues that the company almost continuously faced at that time.

Q. Subsequent consulting work in the petroleum industry— A. In the petroleum in—subsequent—well, as a consequence of this where the object as I say was to provide them with information respecting—respecting what their internal (T. 166) operations seemed to be like from the point of view of how they might be viewed by the Federal Trade Commission. At the time I got a rather considerable education spending approximately eighty or ninety percent of my time out in the field making studies and talking with people with a new language and a new and a different way of viewing the world than the economist usually views it. As a consequence of that, I

came up with certain notions that dealt with strategic alternatives that might be available to that company and so unsolicited I made some suggestions to them regarding marketing strategies and the consequence of that was that I drifted finally in the—during the latter two years of my work in Chicago where I was in the consulting business as I indicated into problems of marketing strategy and tactics from the point of view of just commercial policies as opposed to the question of the relationship to governmental affairs.

The consequence of that was after I joined Harvard hadn't—gotten some reputation in the industry by then and published some things rather frequent requests from other oil companies to help them on strategic matters and that involved questions of representation policies, how many stations should someone have in an area or in a given community. It dealt with questions of the type of stations one might have, large or small, many bays, no bays, few bays, (T. 167) number of pumps. It dealt with questions of dealer operations versus company operations. It dealt with questions of pricing. It dealt with questions of the physical distribution and their costs, the optimizing and developing optimizing models with respect to those.

Q. Professor Levitt, have you reviewed Chapter 854 of the Laws of Maryland 1974? A. I have.

Q. And have you specifically reviewed the provisions of Paragraphs B and C of that Act? A. I have.

Q. Have you formed an opinion as to the affect of that Act on the Maryland consumer? A. I have.

Q. What is that opinion?

(Mr. Woodstock) Objection.

(Court) What's the objection?

(Mr. Woodstock) Your Honor, I don't believe that he's testified that he's done any interv—done any research as

to its impact upon the consumer. He said he's researched the retail marketing with regards to the facilities utilized by these people. He's talked to service station dealers but as far as I can recall he's said nothing about consumer studies with regards to the State of Maryland and consumer preferences.

(T. 168) (Court) Sustained.

Q. Professor Levitt, have you formed an opinion as to the effect of the Act on competition in the retail petroleum market? A. Yes, I have.

Q. What is that opinion, sir? A. The opinion is that the consequences of the Act would be to reduce the competitive vigor of the retail petroleum marketing in the state with a consequence of increased prices for—at the consumer level and a reduction in the variety and convenience of the retail offer available at the retail. I might say, Mr. Noonberg, if I might, specifically that the process of the work that I did here was in preparation for this leads inescapably and inevitably to a consideration of what the competitive effect is going to be and by deduction it is very easy to see how that competitive effect impinges upon the motoring public.

Q. All right, well, let's—we'll direct your attention to the competitive effects of your studies and the background and experiences you've brought to bear and I think the conclusions concerning that will be apparent. Now, Professor Levitt, you used the term by the way "retail offer" in connection with your response to my last question. Could you explain to the court what you mean and what is generally (T. 169) meant by the term "retail offer?" A. Yes, that's probably useful. Retail offer refers to that mix—that variety and mix of goods and services, convenience and benefits that are provided by retailers for the—in connection with their efforts to attract and hold retail patronage. In petroleum business,

for example, this means the prices that are offered, for example, the range of prices, the mix of prices within the range, that is to say, whether there is a large variation, not just whether there's a large variation or a small variation in prices, but what the distribution is within that range, whether it's more on one side that the other side, it deals with the variety of product that's offered in gasoline, the variety of other kinds of products, TBA, the TBA reference, tires, batteries and accessories, it deals with actually the convenience of retail locations or where they're located in terms of how people travel and where they travel, the quality of the services that may be offered, the reliability that are associated with them, the guaranties that may be offered. It deals with the promotional activities, the inducements that may be used to attract and hold patronage other than price in itself. It deals with the management of the retail process so that the station perhaps looks either clean or not clean, whether the station looks streamlined or whether it looks in some fashion (T. 170) by some standards that are differently. It deals with the speed of driveway service which is very critical in the petroleum industry and retailing for major segment of the population.

Q. Now, Professor Levitt, you indicated that in your opinion Paragraphs B and C would result in a reduction in competition, an increase in prices and a decrease in the retail offer.

(Mr. Woodstock) Objection. Your Honor. I believe the witness stated it would reduce competition—competitive vigor in the state not competition or the broad term "competition" which does encompass apparently consumer preference.

(Court) Rephrase your question please.

Q. Professor Levitt, I believe that you indicated that it is your opinion that the effectuation of Paragraphs B and

C of Chapter 854 would result in a reduction in competitive vigor in the retail petroleum industry, an increase in prices and a decrease in the retail offer. How would you explain please, sir, how that would be caused by Paragraphs B and C of the Act? A. There—by definition certain firms now doing business at retail in Maryland will be excluded by virtue of the fact that those two provisions are divestiture provisions would prevent firms which are partially or wholly (T. 171) integrated in the production and refining from operating in this state so by definition you get a reduction in number of competitors and I think I can show as well the equivalent a reduction in competitive vigor. Two, the Act would clearly restrict entry of competitors in the market and three, I believe those provisions of the Act would substantially reduce the likelihood of customer benefitting innovations and experimentations of retail.

Q. Would you explain please now taking each of those elements that you have identified separately, would you explain please to the court how Paragraphs B and C will result in each of those consequences? A. Well, the reduction—the reduction in the number of competitors and number of retail service stations that's occasioned by divestiture provision which means—which requires firms that are integrated in some proportion to divest themselves of those retail operations means that there is a great likelihood that, you know, ba—obviously they will be deprived of the right to do retailing business in that fashion in the state and that leads to a reduction in competitive pressure and competitive vigor particularly in respect to prices. If I may—

Q. Would you explain why you say that? A. Yeah, I'd like to explain that because it's surely (T. 172) almost central to this matter of the price part of the opposition at least.

There are in the pretrial order in Exhibit B, the facts that everyone has agreed to, it lists two hundred and thirty-three company operated retail service stations. Of those two hundred and thirty-three, two hundred and nine operated—would be excluded under the Act because they are operated by companies that would be precluded from those kinds of operations under the Act. Of the two hundred and nine a hundred and forty-seven of those stations are operated by companies that have chosen to use price as an important part of their competitive strategy. They are the kinds of stations which were yesterday referred to as sort of price marketers. So it is—and they I think perform a profoundly important function in creating the vigorous competitive price pressures in the Maryland market and in other markets that I know quite well elsewhere because they have employed price as a central part of their marketing strategies, a central part of what it is they're trying to do to attract and hold consumer patronage focusing their effort on that segment of the population which responds to price, which, by the way, is getting increasingly larger. Now to understand it seems to me why it is a particularly serious problem which I believe it to be to exclude them from the market, it seems to me we ought to talk about (T. 173) a couple of other things. First of all, we heard Mr. Chandler's testimony yesterday in which he asserts that there is no way in his judgment Kayo Oil Company could operate, could provide and offer these lower prices except through dealer operation—

Q. Except through— A. Except through, excuse me, except with dealer op—except through company operations because company operations provide certain kinds of economy particularly in management, particularly in labor and particularly in the use of other resources like

land and equipment, but is able to get the cost structure down so they can use price as a competitive weapon.

I think that is not only true with Kayo but it's true with the others as well. As a matter of fact, it's useful to understand that when we talk about so-called price marketers they're not all the same. They—there is also a major difference in the retail offer among so-called price marketers or independent brands. One needs only to see if—one doesn't need to be a marketing expert from Harvard University or anywhere else to see that, all you have to do is drive down the street and take a look at the difference between a Kayo station and a BP station. You can see that there are major differences in the strategic tactics here although price is one of them, but the common thread among them is that they have (T. 174) to get their operation, the costs of their operations down such that they have enough play to be able to use price as a competitive weapon; and we know that this is the method by which almost all price marketers, the large proportion of price marketers in the case of—that this is the method by which they operate because that's the way they can get their costs down to deal with that particular segment.

Now the interesting thing is that this is not an isolated situation of the petroleum business and if I could have a minute, I'd like to explain what I mean about that because I think it's useful to see how the particular competitive function that they perform in this industry relates to what's happened elsewhere.

Q. Please do, sir. A. Now there's a very common concept that's used to—to—that explain, if you will, a particular phenomenon that seems to have repeated itself over and over again in marketing around the world through its long history and that is the concept of the wheel of retailing. The wheel of retailing says that in the

retailing world some things happen over and over and over again. It's just a wheel that keeps turning and this has been sort of documented historically going back to Babylonian days and one of the major things that happens over and over again is that certain (T. 175) kind of retailing institutions develop. Take, for example, the department store. The department store developed in the United States in around 1890s and it was a revolutionary development. Department stores were treated by the competitors that they displaced, namely, the small specialty shops stretched along—stretched in a downtown area of cities. Department store was greeted by existing retailers with about as much love as the discount store was greeted by department stores in the 1950s because what the department stores did was provide the consumer with a different retail offer. He had lots of departments, that is, the specialty departments under a single roof which provides the convenience and ease and the simplicity which attracted the patronage since the people wanted to shop there. Department stores were profoundly important, the seminal retailing marketing institution of the nation for well over fifty years until lightning struck in the 1950s with the rise of what we now call the discount store. We now call them mass merchandising stores, it was the discount store that we know today as K-Mart and Woolco and Arlans and Zayres; and originally those discount stores—they started up in Pawtucket, Rhode Island for the most part and all they were really was stores selling consumer—dispensed consumer soft goods, dresses, textiles that were left over from companies that either had fires, went bankrupt or—or didn't plan very (T. 176) well and you can't plan very well in many cases, always going to be some disaster; and what they did is they took old, abandoned warehouses and they started to sell this stuff off at

so-called distressed prices because they bought it at low prices. Well, the few fellows like that did this—this is very well documented, by the way, Mr. Noonberg, a few people did this and they found that the patronage was so strong they started to arrange to buy products manufactured for their—for them as distinguished from just buying distressed products and that was really all—it was called the retail—the soft goods revolution it was called. It quickly spread, phenomenonly rapidly into hard goods and other kinds of items that we see today. An interesting thing about it, what was their success, the reason they were successful in—to a considerable part was that they had very slimmed down, low cost operations, first in abandoned warehouses or in old abandoned textile mills. Two, they offered no delivery, they offered no credit, they offered no sales help; that was self service. They offered no returns. It was an absolute slim down operation and so the patronage—what they were—they discovered suddenly that there was a low price market or a market out there which was very, very much responsive to lower prices rather than the elaboration of service which had in the meanwhile been built up in the department stores. The department stores (T. 177) had increasingly more elaborate furnishings, increasingly more elaborate decor, increasingly more proliferated costly activities and so their cost structure had come up and these people just slid in underneath them in the cost structure and they priced that way.

(Mr. Woodstock) Dr. Levitt, excuse me.

Your Honor, I'm going to object. It's beginning to sound like a lecture.

(Court) Well, that's what it was designed for, wasn't it?

* * *

(T. 178) A. Yes. I think the same thing – the supermarket is the same kind of an illustration, Your Honor, that's happened in the 1930s, but what's involved simply is a stripped down, simple, easy operation that's slides in under the more elaborated wider service, higher cost institutions that have grown up and so the wheel turns and this as the supermarket and so now we have the so-called discount revolution and mass merchandising.

In the petroleum industry the same thing happened. Yesterday Mr. Chandler referred to the growth of the petroleum industry where the original discounters were people who operated gas ations next to railroad spurs, if you will recall that he referred to. He's quite right about that. That's where the spur name came from. That's where the word tank car price comes from that's used in the petroleum industry today. It was the price at the tank car and these (T. 179) original institutions were the same kind, they—they provided just a pure gasoline service; people had to go out of their way to get there and there was no investment—hardly any investment in real estate and hardly any investment in any kind of service.

What has happened is in the petroleum industry is that as things evolved we see a larger and larger proportion of consumers responding to that type of marketing, that kind of price. We also find increasingly as in the retail business where we see that the discount store today isn't the old warehouse operation it used to be any more or the old abandoned textile mill any more. They've built buildings of their own in high-priced locations designed specifically for that kind of mass merchandising and that's what's happened in the petroleum industry as well.

Q. And what conclusions do you draw from that historical example and that concept of the wheel of retailing? A. The conclusion that I draw, Mr. Noonberg, is there is a kind of a constant competitive evolution going

on that consumers cha—tastes and preferences and notions about what value is changes over time, that in open environment there are lots of eager entrepeneurs out there who seek to convert that change in consumer preference and taste to their own advantage by exchanging their energy and their imagination and the (T. 180) provision of certain kind of retail offers for the consumer patronage.

Q. And what conclusions do you then draw with respect to that on Paragraphs—the effect of Paragraphs B and C if effectuated? A. Conclusion is that the only way you can get those costs down which we have demonstrated before and which have happened to other forms of retailing if you control the operation heavily to get the low cost operation, in order to get that low cost operation in order to be able to offer a low price with that mix of consumer benefits; and what we have here in this legislation is really an attack on commercial evolution, reducing the number of competitors, forcing some of them who operate this way out who are the most—who are the most vigorous in their assertion of using price as a competitive weapon, who are responding to what's going out in the marketplace, denying them an opportunity to do that and as a consequence eliminating the kind of price pressure which they provide in the market which tends to assure that on a general competitive basis in the Maryland market we will have a kind of a—an equilibrium of minimum prices with the kind of a range of other retail offers that people want. I think the thing ends up clearly to be anti-competitive and anti-consumer.

Q. You used the term "minimum prices", will result in (T. 181) minimum prices, do you mean maximum prices or did I misunderstand your point there? Let me direct the question to you directly. If Paragraphs B and C are

effectuated, what result will this have on retail gasoline prices in the State of Maryland? A. It will raise them.

Q. Thank you. You indicated, Professor Levitt, that in your judgment as a result of the effectuation of Paragraphs B and C barriers to entry will be created in the retail petroleum market. Would you explain what you mean by that, sir? A. Yes, sir. By barrier to entry I mean that it will create positive disincentives for new marketers to come into Maryland and it will create positive incentives for some who are entrants now, who are here to leave; and there are at least sort of three ways it seems to me in which that conclusion can be verified.

In the--however you classify integrated companies what proportion of crude they produce or what proportion of refined, what proportion of the products they sell they refine themselves, however you classify, whether the FTC is classifying them or the Lumberg organization out in California which is the best known and best regarded organization that does sort of studies of industry, pricing conditions in retail (T. 182) operations, it's widely published; everybody uses the data. However you classify those, there's one group of sort of a group number called group one brands that operate. They have--sell by brand in twenty or more states around the nation and have the larger proportion of integration. All those fifteen brands are in Maryland, operate in Maryland now. Group two category consists of thirty-seven companies that operate in either less, twenty or less states that are also integrated in some proportion. Of those thirty-seven integrated companies only five are now represented in Maryland, PMC, Crown, Tenneco, Ashland and Hess. Thirty-two are not represented.

As I can--as you can see from the list--just of those five, a large proportion of those thirty-seven, first of all, have aggressive pricing practices that the segments of the

consumer tool which they address themselves particularly and they use price as a powerful competitive weapon with the kind of streamlined operation, the kind that I talked about before, although not necessarily or totally. They would be excluded from this Maryland market. Their names are known. There they are. We've only got five out of thirty-seven. Entry for them would be prohibited; and this business about even if they didn't use price and therefore company operated stations as a competitive weapon to come in, they would probably be excluded anyhow because of this legislation which (T. 183) prohibits company ownership and that I think is the second question to which I want to address myself.

You heard Mr. Harvin say yesterday that when Exxon entered the Florida market it was during the fall of '61 if I recall correctly. They did so through company operations in order to establish locational routines, in order to establish an image of presence that would attract dealers because why should a dealer go to a new brand when he can go to an established brand. He reduces his risks and how could they attract dealers. Actually Exxon originally went into Florida with company oper--with dealer operations. They found that dealer operations simply did not work and they changed to company operations and they stayed with company operations for five or six years, almost six years in order to build up a reputation of their presence, in order to understand the management of that particular market in such a way as to be able to attract dealers who could--who would risk their own capital on dealer operations. The same thing happened to Exxon when it went in Ohio; and it went in Ohio as a brand; it had--it started off in dealer operations. It didn't work. It went to company operations. They were in company operations for a good number of years before the image and the reputation that

it built sufficiently that they could attract dealers who would risk their capital to operate Exxon (T. 184) stations on a dealer basis. So the entry of unknown brands even with an enormous reputation that Exxon is presumed to have here in Maryland and it does have in Maryland, but not everybody lives in Maryland, we see in those situations, in those two states even with that reputation they found that they have to have company operations, therefore, the entry into a new market is most commonly accomplished I think we can see that even for well-known brands and those remaining thirty-two are not that well known. Some are like Marathon, for example, or Clark. Even they require a period at least of company operations in order to establish themselves so they can be effective in the marketplace, sufficiently effective to shift to dealer operations to be able to attract dealers.

Q. What was the third aspect of these barriers to entry that you referred to, Dr. Levitt? A. The third aspect really deals, you know, primarily with backward integration.

Q. What do you mean by that term? A. Well, it's sort of an economic term. It–

Q. Well, in the context of this case. A. Okay, in the context of this case what it means is this that anybody who is purely a marketer in this state now and who is not–who is not a refiner or not a producer like Hudson, for example, or Homoco, for example, anybody (T. 185) who is now just a marketer under the provisions of Paragraphs B and C if that marketer wanted to integrate backwards and get into the refining business or get into crude business, he would either have to divest himself of the retail operations in Baltimore, in Maryland or would have to change his mind and not go into the refining business. Now–

Q. What effect does this have on competition? A. Well, it–one, it has I think a tendency it will, no question, I think it will reduce competition at retail because they have to withdraw and it will also reduce–and if they withdraw, if they decide not to go into refining, for example, it reduces the amount–the number and amount of competitors at refining and, therefore, at wholesale and reduces the sort of pressures to get prices down. I might say, Your Honor, this is not a speculative matter about integrating backwards. It's a matter of fact, it's a venerable tradition in this industry as in others. John D. Rockefeller who cannot be accused of being unknown anywhere around the world, started this way. He was a vegetable peddlar in Cleveland. He got into the oil business. He was an oil peddlar and he integrated backwards; and right here in Baltimore we have the case of Jacob Blaustein who was the originator of what is now known as the American Oil Company. He also started as a peddlar. More recently we have Hess (T. 186) in the same situation is a very vigorous marketer who's done the same thing. More recently we have had trade reports through Mrs. Hudson, who is a vigorous price marketer, throughout the mid-continent and East, has said that she is considering getting into the refining business. Only in September we find that Frank Ulrich; who runs the large Uco Oil Company in California, who is a vigorous retailer, has just gotten in the refining business by buying out a twenty-five thousand barrel a day refinery that Gulf Oil can't make profitable but he thinks he can. We have John Shaheen. Well, Shaheen played around in other areas as well, but he built–he went in the refining business building one from scratch. We have Scots which has twenty-one stations in Baltimore, in–in–in Maryland, which started out as a retailer. PMC, Petroleum Marketing Corporation, integrated backward in refining. It's not

something happened long ago in Ohio with John D. Rockefeller is what I'm saying. It's a venerable tradition. It's happening now so this idea of integrating backwards—Clark has done it. That would be a great area to that kind of integration backwards unless they decided, you know, they've got to make one choice or the other. Either get out of Maryland with the price pressure and competitive functions they perform or not integrate backwards. In both cases I think the public is going to lose.

(T. 187) Q. In what way? A. Well, if they're not—if they get out of Maryland, if they don't use their particular competitive—their competitive presence is not felt, which has a price reducing consumer benefitting quality; and if they don't get in refining with their particular kind of strategies, then the volume of product they would produce would not be available at wholesale would create competitive pressures there, reduced price.

Q. Professor Levitt, you also indicated that opportunities for innovation in the retail marketing of petroleum products would be reduced. Would you explain that, sir? A. Yes. We heard testimony yesterday about certain innovative and experimental activity. You don't have to call them innovations. You can call some of them experimentations. Somebody—it may be an experiment where you try to do something that someone else has done but the consequence may be the same from the point of view of the economic consequences or competitive consequences. I think Mr. Harvin's testimony yesterday with respect to that was interesting.

I think what we see here—he was thoroughly talking about two innovations. If I could explain, there—you can talk of innovations in two terms. You can talk about institutional innovations and you can talk about functional innovations.

(T. 188) Q. Could you give me an example of— A. Well, the institutional innovation is like the mass merchandising discount store versus department store or the supermarket versus the the corner grocery store or the major car care center versus the corner service station or a car wash addition or a—even a self service gasoline station, something that's happening right now. The self service station is not just a sort of functional innovation. It costs between eight and twelve thousand dollars to convert a station from general operations in Montgomery County here and Baltimore County from a regular station to a self service station because the fire laws require you to have certain kind of safety equipment. Now eight to ten thousand dollars is not a trivial number when you multiply it by five hundred and thirty-two. It comes to over five million. So the magnitude of that is an institutional innovation.

Operating innovations I would talk about fussing around and experimenting with hours different kind of merchandising techniques, playing around with the product line which you offer and which you don't offer, new kind of bookkeeping devices, new kind of training devices for and training methods or different kind of training and hiring practices for dealers, guaranties of repair and maintenance service, different kinds of strategies as (T. 189) according to how you lay out your service stations. It's surprising how much different in patronage you get by the way in which the service station is laid out on the corner. It's something trivial in the court room but from the point of view of commerce it's pretty important as to whether you have—as to whether you have it laid out diagonally on the corner or mostly facing one street or mostly facing the other street and these things have to be studied and played with and

understood and investments have to be made; and they have to be controlled. In both of those cases the important thing is if you're going to experimentation, you've got to do it under conditions which you can control and you can't control if the station or the operation is not owned by you. You can't tell a man exactly what to do, you can't tell him how to operate, you can't measure things, you can't do any of these things. It's like in a laboratory. You've got to have a controlled environment, otherwise you don't know what the answer really is.

So those kinds of innovations have almost always been done under controlled environment, which means you've got to operate the station; and if you don't—can't operate the station, then you can't control it and if you can't control it, you don't want to risk the experimentation because you don't know the outcome; and the experimentations (T. 190) of the kind that I've been talking about are experimentations that have only one purpose, one purpose ultimately and that is to provide and mix a retail offer such that the experimenter will be able to attract and hold more patronage; and the presumption is—the reason he attracts and holds more patronage is because he is doing something that the consumer wants and somebody is not. That's the only, final purpose of it. That's the only reason he does it, to get and keep patronage; and the consumer finally decides whether he wants to go to place X or Y or retail offer X or Y; and if you can't test that out because you can't control it and you can't study it and you don't want to engage in throwing money down an experimental rathole when you can't control the situation and know what the outcome is going to be, then it's just not going to be done; and the consumer benefitting results will not be there; and so for that extent again, it's anti-competitive, it's anti-consumer,

it's destruction of precisely the kind of momentum and variety and opp—and incentive system that you want it seems to me at least.

Q. Professor Levitt, have you focused an opinion as to the effects of Paragraphs B and C on the flow of commerce from and to Maryland from outside the state?

(Mr. Woodstock) Objection, Your Honor. I don't believe there's been any foundation in the interrogation of (T. 191) this witness on direct regarding a flow of commerce.

(Court) Well, he states that in his qualifications as I recall it he's studied all sorts of effects of the anti-trust laws upon economics and that sort of thing; and certainly if he's done that inherent in these studies would be the flow of commerce I would think.

(Mr. Woodstock) Can I ask then that we have a definition of the flow of commerce. It is a legal term used in anti-trust law with very significant meaning at least to me.

(Court) Well, all right, you can cross examine as to his qualifications as to that if you wish.

Q. Professor Levitt, you may answer the question. A. I have formed an opinion.

Q. And what is that opinion, sir? A. My opinion is by virtue of the Act creating as I indicated before positive disincentives for certain firms to invest capital and do business in Maryland and by creating positive incentives for them to withdraw not because of any vindictive matters but simply as a pure matter of economics, what will happen is there will be a shift from the normal course of flow of not simply capital but flow of petroleum products to Maryland and in and out Maryland to the extent that that normal flow is impeded, it seems to be a burden.

Q. Professor Levitt, do you see any benefit to the (T. 192) competitive process of the effectuation of Paragraphs B and C of Chapter 854? A. None whatsoever.

(Mr. Noonberg) No further questions.

* * *

(T. 192) CROSS EXAMINATION

By Mr. Woodstock:

Q. Dr. Levitt, my name is John Woodstock, Assistant Attorney General representing the State in these proceedings.

I believe in your direct examination with regards to publications on the oil industry, you indicated that you did publish a major piece of work about the oil industry back in 1959 or so? Is that correct? A. Yes, I believe it was in '59.

Q. Handing you a copy of the document, I'm asking you if that was the piece that you were just talking about. A. That certainly is.

Q. Would you read the title off of it, please, for the record? (T. 193) A. "Competition and Retail Gasoline Prices."

Q. And when was that published? I don't think there's a date on there. I had to look in the book review section to get it myself. A. I think it is 1959, a review of economics and statistics.

Q. Since that time have you published anything specifically on retail marketing of gasoline? A. Yes, I have.

Q. Could you tell me what they are? A. There were a series of articles in NATIONAL PETROLEUM NEWS.

Q. Anything else? A. No.

Q. Can you give me the approximate dates of the series of those articles in NATIONAL PETROLEUM NEWS? A. I think they were in about 1960.

Q. 1960, nothing since 1960? A. Nothing published, no, sir.

Q. By the way, NATIONAL PETROLEUM NEWS, NPN, I believe most people refer to it as, do you consider that an authoritative source on the petroleum industry? A. I think it is quite reliable, yes.

Q. Quite reliable. (T. 194) A. Yes.

Q. Do you recall specifically what the articles referred to and dealt with? A. The articles dealt primarily with the materials that were in that particular article that you've referred to plus other studies that I had done.

Q. What studies? A. Over a four year period I was intensively involved in studying consumer behavior in petroleum retailing.

Q. What four year period would that be? A. 1955 to '59.

Q. Speaking of 1955 to '59, I believe you testified you were an economic consultant in Chicago. A. Yes, sir.

Q. For the petroleum industry. Were you specifically, directly employed by the petroleum industry or a member of the petroleum industry? A. No, I don't recall it was for the petroleum industry. It was in the petroleum industry.

Q. In the petroleum industry. Were you working at that time as an independent consultant? A. Yes, I was.

Q. For whom did you work during that period of time? A. In the petroleum industry my work was exclusively (T. 195) for the Standard Oil Company of Indiana.

Q. That was the only oil company you worked for? A. At that time.

Q. If you recall, do you—you can recall for us what percentage of your work as a consultant during those years were to things other than the oil industry? A. It's some fractional percent between ninety-nine and a hundred.

Q. So it was a very small amount? A. Yes.

Q. Did you have an employment contract with Standard Oil? A. I did not.

Q. Did you have an office within the Standard Oil building or– A. I did.

Q. But you were not technically an employee of Standard Oil? A. I was not an employee. I was not part of the benefits program.

Q. Have you done any work for Standard Oil or any of the other oil companies since that time? A. I have.

Q. Would you give us some idea who they are? (T. 196) A. Yes.

Q. And the nature of that work please? A. I've done work for Mobil Oil Corporation, Exxon other than in relation to this litigation, Sinclair, Meadville Corporation.

Q. Are they an oil company? A. Meadville is the parent company of Saveway which now has an association with Hess, which is an independent firm heavily engaged in low price strategy market.

Q. What specifically did you do for Mobil Oil? And approximately when? A. The Mobil Oil period was roughly between I would say 1960 and 1965 to '66, extended for five or six–five years I think at least. I was involved and retained by them primarily to help them to be more effective in retail marketing which involved problems of representation strategy, that is to say, how many stations they should have in a particular area, locational strategy, service station design, layout, dealer development and training; and I was also deeply involved as a consequence of particular initiative I used there in the creation and establishment of major car care centers. Indeed the first car care center in America of the magnitudes of the kind we were talking about yesterday or Mr. Harvin was talking about yesterday were established by (T. 197) Mobil Oil Company, the first one in

Cherry Hill, New Jersey designed primary to specifications that I laid out at that time, both the operating specifications and the strategic purposes.

Q. When you were advising Mobil, for example, about station numbers, did you have a general view as to whether or not there was an overabundance of stations or too little stations or in general now in retail marketing of petroleum product or didn't you hold to any such view? A. No, I held no general view with respect to that as far as I can recall.

Q. What did you do for Exxon and when? A. My work with Exxon was very limited. It occurred at the time of the embargo in 19–in November of 19–the OPEC embargo in November of 1973 and it dealt almost exclusively with two things, one, the question of what Exxon should do in respect to its advertising policy since suddenly there was a greater demand than there was product available, should it advertise and if so, what, to the retail consumer; and two, we had rather extensive discussions confined to the most of about three hours to the question of what the future consequences might be of this OPEC embargo.

Q. Was that relative to future supply? A. The supply issue was certainly involved. It dealt with strategic consequences from the point of view of really (T. 198) service station types and locations.

Q. What was your view at that time regarding the effects of the shortage as it related to retailing? A. My views at the time were that the OPEC embargo could not possibly hold and that the shortage was likely to be short lived.

Q. And that had certain ramifications or effect upon retailing or– A. Since the issue was–since the question was what should be done in the future on the assumption that this kind of OPEC embargo should hold the fact that

my conclusion was that it would not hold either that it would not hold or other sources of supply which I knew at the time were already on their way would—well, would be stimulated as a consequence of that since the conclusion was that it would not be a chronic shortage caused by that, then the question became moot as to how to react to it.

Q. In other words, do nothing, just keep things going as they are, is that your suggestion? A. In respect to that particular question and that was really the question.

Q. What about for Sinclair? A. For Sinclair I was involved for a couple of years and I did rather extensive study, ended up to about two or three (T. 199) hundred page report with a great deal of looking at data and a great deal of field work dealing with ways of improving their marketing activities which covered the whole range of—

Q. Excuse me, what period of time was this? A. That was roughly between '65 and '66, I sus—I think it was probably about '67 and '68.

Q. Well, which one, '65 or '67 to '68? A. I think it included 1967 and '68.

Q. What were your recommendations to Sinclair? A. —

Q. The reason I asked is they're no longer here. A. That's right, they were acquired subsequent to that.

Q. All right, what were your recommendations? A. I'm afraid it's going to be a long lecture. It was three hundred pages.

Q. I'll withdraw the question. Did any of these consulting services that you rendered to either Mobil, Exxon or Sinclair, were any of them specifically directed in any way to activities in retailing in the State of Maryland? A. No, sir.

Q. Were any of them directly related to company owned and operated facilities? A. Yes, sir.

Q. Which ones? In Maryland now? (T. 200) A. No, sir.

Q. What did you do for Meadville Corporation? A. I consulted with them on the issue—on two issues, one dealing with their representation strategy whether they should or should not increase the number of retail stations in given communities because as you know, Mr. Woodstock, they have a strategy of very limited representation in any market that's spread over a large area. Two, if there were a change, what the investment policy should be with respect to land and buildings because they become more—everything has raised everything obviously.

Q. I believe you said they have a current association with Hess. A. They do.

Q. What type of association? A. Hess is a minority owner of the company now.

Q. Minority owner? A. Yes, sir.

Q. Saveway to your knowledge owned by any producer or refiner? A. Hess is a—

Q. That's a minority owner, isn't that what you just said? A. Yes, I thought you asked whether—

(T. 201) Q. But Meadville Corporation I imagine is still a parent with a majority, is that correct? A. Yes, sir.

Q. Is Meadville Corporation owned by a producer or a refiner or is Meadville a producer or refiner? A. Meadville is partially owned by Hess. In the stipulation of facts—in the pretrial order on Exhibit B to which I believe you agree—

Q. I'm asking you about— A. —is listed as a refiner.

Q. I'm asking you about your knowledge, not—is your knowledge—A. That is my knowledge.

Q. —based on the pretrial order? A. That is my knowledge, sir. I'm sorry I didn't mean to include that part. It is knowledge.

Q. I believe you also testified on direct that you've never appeared in a court room before, is that correct? A. That's correct.

Q. How about—have you ever appeared before any legislative bodies? A. Yes, sir.

Q. Let's start with the federal scene, have you appeared before Congress? (T. 202) A. No, sir.

Q. State? A. One.

Q. Which one? A. I appeared before a legislative committee of the State of Massachusetts last February at a hearing.

Q. What was it about, do you recall? A. The hearing was about the question as to whether there should be legislation prohibiting integrated all company ownership or retail—retail operations and I was asked to do that because they had heard that I was doing a study of this down here so I appeared for a maximum of I suspect ten minutes.

Q. Did you do that for the benefit of the Legislature? A. No, sir, I was asked to do that by the Massachusetts Petroleum Council.

Q. Do you know who that's made up of? A. Massachusetts Petroleum Council is a trade association whose members I think are primarily petroleum refiners.

Q. And they would have been affected by this legislation, is that correct? A. Yes, indeed.

Q. To what extent?

(Court) Mr. Woodstock, is this going to (T. 203) help us in this case

(Mr. Woodstock) I believe it goes to the credibility of the witness, Your Honor, and then to his testimony as to divestiture—

(Court) His credibility? You mean you don't believe him?

(Mr. Woodstock) No, Your Honor, I think I'm just trying to find out if—and we'll also seek in other lines of questioning to see if the witness and his expert opinion is somewhat perhaps number one, against government regulations and interference whatsoever with the economy; number two, whether he is major oil company oriented or large company oriented.

(Court) Well, surely if he only appeared before one Legislature, it can't be too serious along those lines, but let's move along, please, sir.

A. Mr. Woodstock, I've been asked numerous times to appear before all kinds of legislative and court hearings; and I've just assiduously refused to do so. The only reason I agreed to do it here is because this is some industry I knew a lot about because I've been around it for twenty years and I felt pretty strongly that what was about to be done was idiotic.

Q. Are you receiving a fee from Exxon and Continental (T. 204) for your testimony to us? A. Yes.

Q. What's the amount of the fee? A. The fee is sixteen hundred dollars a day.

Q. How many days— A. It's standard—which is my standard fee.

Q. How many days have you put in so far? A. Let me see. Estimate, that's all I can give you. I don't have the record. I don't remember what it is. I'd say probably over twenty—twenty-five days.

Q. Twenty to twenty-five days. A. I'd say that's probably minimum.

Q. I think you also testified on direct examination that in particular—for particular research of the Maryland market you were travelling or—in and around Maryland for three days. May I ask you what specific data or notations that you observed or made? A. Yes, sir.

Q. About the market. A. I obviously saw the visible externals and I made some specific efforts to see what pricing practices were, see what the mix of retail offers were by stations of a great variety of strategies, to talk to dealers and operators.

Q. How many–how many dealers did you speak to? I think (T. 205) you said six or– A. No, I think it was eight to ten. I think that's probably minimum too.

Q. Well, how minimum? I mean– A. I talked to at least eight to ten.

Q. You're familiar then with the contents of the pretrial order and consequently I'm sure you know there are at least thirty-seven, nearly thirty-eight hundred service stations in the State of Maryland. A. Yes, sir.

Q. Do you think by talking to six or ten dealers you're accomplishing anything about finding anything about the retail market?

(Mr. Noonberg) Objection.

(Mr. Woodstock) Your Honor, the question is saying–

(Court) Well, I'll let him answer it. Go ahead. That's right, let him answer.

A. The answer is yes.

Q. What specifically do you gain from talking to perhaps six or ten out of three thousand? A. As I've indicated, I've done very intensive studies of the industry in lots of different locations, all–as you can see from the publication, all over the midwest and the east so I don't have to invent gravity each time I analyze the (T. 206) situation having invented it once before, not that I did, but this is a matter of confirmation and understanding of some things that I may have already known. There are sufficient similarities in patterns of retail activity in all trades that what one wants to do is make sure that there aren't any unique differences in one area to the other and to understand those differences if there are;

so in part this was an attempt to examine the present situations at one location to determine how different, if different, it is from other situations and to analyze what specifically is going on if there is differ–there are differences. For example, I noted an extraordinary range of retail prices even among major brands in close physical proximity to each other.

Q. Excuse me, Dr. Levitt, I think my question–

(Mr. Noonberg) Let him answer–

Q. –is directed to what you gained from speaking to six retail dealers. It was not about the physical observations– A. I gained in knowledge of the fact that there is a wide range of differences in retail prices among major brand outlets in close physical proximity to each other, much wider than the ranges that I had observed in the studies that I had made and that I published as you can see, based upon data in the 19–latter part of the 1950s and much wider than the range that I had observed even in the 19–then later in the (T. 207) 1960s among firms with similar marketing strategies. I observed a clearly some competent and aggressive price oriented marketers in Maryland, as evidenced by BP and Redhead and Crown and a wide range of others. That combined with the data that I had previously gathered gave me some indication and based on my previous knowledge as to what might explain those continuing successes. I made considerable effort to find out what the supply situation was, where did crude come from, how it is transported into Maryland, from what–what those volumes are, how they transported within the state and from without the state into the state, see how those relationships were and how those things differ as between a major metropolitan area like Baltimore and more distant and somewhat more rural area like Cambridge.

Q. Once again I'll ask—try again. What did it accomplish, what did you gain from speaking to six to ten dealers out of possibly thirty-eight hundred? Are you trying—is it your testimony that speaking to six to eight dealers in Maryland out of thirty-eight hundred that you view what they said would be consistent in confirming findings that you found on a survey and investigation of over six thousand outlets in 1959?

(Mr. Noonberg) Objection, Your Honor, I think he's answered the question.

(T. 208) (Court) I'll let him answer it.

A. First of all, I did not say six or eight, sir. I said at least—I said eight to twelve—eight to ten that would be minimum. That's twenty-five percent more than between six and eight. Thirty-three percent more actually, but I didn't come all this way—

Q. Please answer my question. A.—to play games obviously; but I feel competent as one who did indeed as you say study six thousand in rather detail and who continued to do work of that kind of quality and objectivity that's reported in the REVIEW OF ECONOMIC STATISTICS which is the publication of the Economics Department of Harvard University which is very high standards for scholarly quality, that I feel competent on the basis of all those years that the kinds of work that I did insofar as direct information is concerned plus the work that I did on the basis of researches that had been done in Maryland, materials that have developed in connection with Maryland that I had an understanding of the Maryland phenomenon and discussions by the way that I've had with six members—six executives of the Exxon Corporation.

Q. All right, let me— A. That—that I'm so confident I know what I'm talking about.

Q. Based on what eight to twelve dealers told you they— (T. 209) that confirmed in part what you previously—

(Mr. Noonberg) I must object. That's not what he said.

(Mr. Woodstock) Well, that was the question, Your Honor. I would appreciate if the Bench perhaps would ask that the witness—

(Court) I know that was the question, but we're just getting on and on and on and I really don't think it has too much of an important part in this situation. Let's move along, please.

Q. You've mentioned you've had conversations with six members of the Exxon marketing organization, is that correct? A. Yes, sir.

Q. What was the length and—length of these meetings? A. That involved, I think, roughly—that roughly involved about twelve hours, I would say, in some meetings I talked to individuals and some I talked to more than one individual at the same time.

Q. Will you tell me basically what you talked about? A. We talked about their perception of the Maryland market, what the dynamics were, what was going on, what the competitive realities were, what their problems were, what—how they operated, what their practices were, what the supply situation was and what the policies were.

(T. 210) Q. And you agreed with their observations? A. My object was not to agree with them. My object was to learn.

Q. Did you seek information from any other source other than driving around the state for three days and talking to twelve dealers to perhaps try to substantiate the information that the Exxon marketing people gave you? A. Yes, I examined a great deal of data that is commonly available.

Q. Such as? A. Well, take PLATT'S OILGRAM, for example, on supply data, published data on the supply—on the stock prices, on who's quoting what prices the supply in. I examined data from the State's—State Comptroller's office and the State tax reports. I examined data on market ranking position and supply conditions, by the Lumberg organization, data by the way that is just not episodic at any given point of time. It's a question of data over a long period of time.

Q. Would NATIONAL PETROLEUM NEWS be included in those materials or OIL DAILY? A. NATIONAL PETROLEUM NEWS data to the extent that they apply to the Maryland situation because as you know they quote certain pricing data by terminals and you have lots of terminals here.

(*T.* 211) Q. Same would be true for OIL DAILY? A. I did not examine OIL DAILY for that purpose.

Q. Beyond those, would it be your testimony it's very hard to acquire any other data on the oil industry beyond those sources, is that correct? A. No, that's not correct at all. The FTC—

Q. Other than— A.—publishes innumerable data and there are all kinds of studies. It is one of the most heavily documented industries in this nation.

Q. Other than the government, as you mentioned the FTC, perhaps the Department of Justice— A. Oh, there are numerous academic studies. You've just referred to one of them.

Q. During your direct examination you gave us the definition of the retail offer and I believe I'm correct. I understood a big part of that definition was that there was a large variety, the mix, the numbers. Would part of your definition of the total retail offer be that—should—there would be a large number of competitors? A. I don't understand the question. Could you clarify—

Q. Well, maybe if you would just give me a very again brief definition of the retail offer. We don't have—I can't have (T. 212) it read back at this time because we don't have that type of a recording system. A. The retail offer refers to that mix of goods and services and the way in which they are supplied, the conditions under which they are supplied, the hours, the practices that would define the detailed environment, includes price, includes station hours, includes product mix, includes quality of the product mix, includes quality of the generic product itself, includes quality of the services, it includes location, it includes varieties of location; it includes types of design and layout of stations and of driveways, like everything which could conceivably affect the way in which consumers behave or affect their choice of where they are going to give their patronage.

Q. Take price within that definition, the range of prices. Would it be your opinion that the more individual price makers you have in a given market that the—generally the greater the price range will be? A. I don't think that necessarily follows at all. The greater the price range, it might follow although I think that's a function again of the industry and of the geographical areas that's published. It can cover a wide geographic area where there are differences in consumer access to those sources of supply, then you may have a wider range than if (T. 213) consumers had equal access to those sources of supply so depending on the geographic area I think to some extent; and it also depends on the nature of the commodity. You know we've got innumerable wheat farmers and we've got one wheat price at any given time.

Q. Does the same hold true for the gasoline? We have innumerable gasoline dealers. A. I know that's why I said—

Q. Does that mean you have to– A.–it depends upon the product category and it depends upon consumer access; it depends on the communication system and depends upon the nature of the product.

Q. Let's talk about pricing in the gasoline market. Would it be your testimony that the major oil companies–would it be your opinion now that the major oil companies when they distribute their product through independent dealer losses that they have no control over the actual retail price posted? A. Correct.

Q. Correct and consequently if you had, hypothetically let's say, a thousand dealers–well, better yet let's say fifty dealers, oil company would have no control on the retail price they posted, hypothetically you can have fifty different prices, is that correct? (T. 214) A. That's correct.

Q. If you take those fifty dealers– A. At any given time.

Q. At any given time. A. Five minutes from then, you might have a hundred and fifty prices.

Q. You take those fifty dealers out of the market, you replace them with fifty company owned and operated service stations, have you eliminated fifty price makers? Potential price makers? A. You have eliminated fifty potential price makers.

Q. And what if you–have you replace them with one? A. Yes, sir.

Q. Haven't you then reduced the number of competitors in that market? A. No, sir.

Q. I don't understand. A. Well, take–

Q. Haven't you– A. Exxon has thirty-six different company-owned stations. They don't have thirty-six–they don't have one price.

Q. Who sets the price? A. The price–

(T. 215) Q. Please answer my question. Who sets the price at goods and services sold at Exxon company-owned and operated service stations? A. It is not set by a single individual.

Q. Is it set by a single entity?

(Mr. Noonberg) Let him answer the question, Mr. Woodstock.

A. It is set by some perception of the competitive realities that face the particular station at the particular location. That's why you have different–but if they had–listen, if anybody had his choice, he would have the highest possible uniform price that he could. The seller doesn't have the choice, that's the whole point.

Q. Dr. Levitt, I'm asking you does the final decision rest with Exxon Corporation as to what the price will be at goods and services sold at their retail service stations that they own and operate. Yes or no, I think is– A. There is also a third answer and that is I don't know.

Q. You were in the court room yesterday, am I correct? A. Yes, sir.

Q. There was testimony by the Exxon marketing official that Exxon, one of the benefits to be gained by company owned and operated service stations, in fact you yourself testified (T. 216) this morning that one of the reasons you should have company owned and operated stations is that you can control the whole operation. Part of that control as testified by the Exxon executive yesterday is control over the price of the product– A. You're talking about specific price, sir, not about–I'm talking about the level of prices and there's quite a distinctive difference.

Q. I– A. That is why, for example, if I may answer, that is why there are such–why there are differences between those thirty-six stations.

Q. I'm asking– A. I'm not suggesting–

(Mr. Woodstock) Your Honor–

A. I'm sorry, sir, excuse me.

(Mr. Woodstock) I'm on the verge of becoming argumentative and–

(Court) Well, I noticed that.

(Mr. Woodstock) Well, I would respectfully request the court to instruct the witness to answer my questions and then if he'd like to explain–

(Court) Well, I think he is trying to do it, but you're starting to argue with him, so let's try to (T. 217) ask specific questions and let's see if we can't get the answer and let's move along.

Q. At Exxon company owned and operated service stations with whom would the final decision lie as to what price goods and services are sold? A. Excuse me, can I get a clarification? Are you talking about Baltimore or Maryland?

Q. Okay, let's confine it to Baltimore, Maryland. A. I cannot answer it with absolute–cannot answer that question with absolute certainty.

Q. So it's your testimony you don't know who sets the prices at Exxon car care centers or company owned and operated service stations? A. Who is a very complicated word.

Q. I'm asking you if it's Exxon Corpor– A. Talking about a single individual, you talking about a committee? Are you talking about–I really don't know.

Q. I'll rephrase the question. A.–think it so easy. You understand I'm not trying to be evasive, sir.

Q. Are goods and services sold at Exxon company owned and operated service stations throughout the State of Maryland, throughout the nation, are those prices set by Exxon Corporation, (T. 218) employees of Exxon Corporation, agents of Exxon Corporation or are they set

by some independent individual who is in no way paid, controlled or in any way under the direction and influence of Exxon Corporation? A. They are set by someone who is an employee of the Exxon Corporation.

Q. Thank you. Is that different, significantly different than the situation where you have fifty independent businessmen and you've previously testified to the company having sold them the products, would then post–be free to post their own retail price? Now is the dynamics of that situation different? A. I would certainly think that it is different.

Q. And haven't you in fact reduced the potential number of price decision makers where you replace fifty dealer leasees with company owned and operates stations? A. You have reduced that number although not necessarily reduced the competitive vigor of the outcome. Prices could conceivably be lower. The price decision making practices could be more informed. The strategy could be much more oriented toward being a price marketer or a less oriented price marketer, whatever you will; but the managerial contents in the decision maker is the critical factor here. It's not necessarily the number, the absolute number although (T. 219) I will grant the absolute number has something to do with the outcome, but it's the managerial competence, its strategies, the decisions that they have decided to make as to exactly what it is that they want to do and how they want to compete, it's the information that they have available regarding the realities of the marketplace at any given price, –any given competitive zone or competitive area that are critical. It may very well be that single individual is much more profoundly and better informed about the competitive realities in the market than fifty people–a good thing is not necessarily multiplied–increased by its multiplication.

Q. Continue our hypothetical further, every major oil company doing business in the State of Maryland who are listed in the pretrial order which you reviewed eliminated dealers even just by fifty percent or twenty-five percent, wouldn't that significantly reduce the number of price decision makers posting of price of the ultimate sale of gasoline to the citizens in the state? A. It would reduce them if the policy were that the managers of the station though employees are not—does have any price discretion, if that were the policy, it could conceivably be that the policy—the managers are to have it, but you're right is the policy where the decision is to be made elsewhere than in the point of sale, it seems just quantitatively (T. 220) reasonable that there would be fewer.

Q. Are you familiar with the term "predatory pricing?" A. Yes sir.

Q. Would you define that for me? A. Predatory pricing—may I say my answer is probably going to be more economic than maybe legal, sir.

Q. Well, I'd like for you to make it quasi-legal, economic— A. All right.

Q. —in the context that you were advising me and I wanted to know what you think an economist in relationship to the anti-trust laws. A. It's pricing practices whose purposes are the illegal destruction of competition.

Q. Included within that destruction of competition would there be— A. Which would tend to—

Q. —specific competitors or identifiable actors? A. Excuse me.

Q. Within that you said destruction of competition, I'm asking you within that competition would that include indentifiable actors, competitors? A. I suspect yes, of course.

Q. Now assume if you will, I'm an evil man and I want (T. 221) to engage in predatory pricing. I have two

methods of distributing my product. Firsthand, I have a thousand people out there to whom I sold products and then they are free to resell it at any price they want. Okay, and next to each one of those thousand distributors is a competitor of mine. The only way I can distribute my product is I can do it myself and my whole purpose and aim and desire is to drive that man out of business because I've got a larger war chest than he does and I know we want to battle it out on low prices, he's going to lose. Now assume again and I know this may be a lie but morally you could give me an independent advice as to which way I could be most successful to accomplish my predatory purpose by which means of marketing my product and pricing it would you advise me to adopt?

(Mr. Noonberg) Objection, Your Honor.

(Court) What's the objection, Mr. Noonberg?

(Mr. Noonberg) The premise of the question suggests that the direct violation of Maryland and federal law and is an improper assumption I think.

(Court) It sounds as though it would be directly contrary to Robinson-Patman, Mr. Noonberg.

(Mr. Woodstock) Your Honor, in response to that, I would say that there's cases after cases of predatory pricing on the law books in which actors in the marketplace (T. 222) actively engage in doing this.

(Court) Yeah, and they're subject to treble damages, too, aren't they?

(Mr. Woodstock) Well, that—

(Mr. Noonberg) As well as criminal prosecution, Your Honor.

(Court) That's right.

(Mr. Noonberg) Under state and federal law.

(Court) I don't know that we can assume that the oil companies and that's who you're driving at obviously

are going to knowingly set out to violate the criminal statutes. I would think it would be very unwise of them.

A. That would have been my advice. Don't do it.

(Mr. Woodstock) The question is—was directed to the mechanism and how one—

(Court) All right, I'll sustain the objection.

Q. Again comparing the two methods of distribution, if I wanted to in some way focus my pricing activities to meet that of a competitor's pricing activities, would direct operation or dealer operations be more effective and more efficient to me to in fact focus my attention and my ability to respond?

(T. 223) (Mr. Noonberg) Before you answer it, could I just ask Mr. Woodstock to give a definition of what he means by competitors? Competitors of whom? Competitors of the supplier or competitors of the retailer? I don't understand that.

(Court) Rephrase your question.

Q. Assume if you will have a—a typical Maryland market where you have major oil companies competing through dealer lessee stations and some of those dealer lessee stations and some of the majors are getting dealer aid from their supplier and reduce their price significantly, three cents below me and I'm the other major that you're advising, and I want to respond to that. Now understand I'm going to put a little qualification on this, okay, they haven't uniformly dropped their price, those dealers that are getting the aid from their supplier, but in one quadrant of my imaginary marketplace they have and it's three or four cents below me. Okay, could I have reason to believe that my competitor's giving support to everybody and I asked you how I could best respond to that price reduction. I currently have an equal number of dealers out there and I tell you as part of the facts that I don't imagine that the situation is going to change. I

believe this supplier is going to keep doing that. Would it be wise for me to give a temporary price reduction to my dealers even though this may continue now for a number of years (T. 224) or would it be more efficient for me to have direct run operations which I control the price and could thereby focus my response on that one quadrant?

(Mr. Noonberg) Objection.

(Court) What's the objection, Mr. Noonberg?

(Mr. Noonberg) I think the question, if I understand it, relates to what Mr. Levitt believes is wise and I don't think that's a proper question for Mr. Levitt to be asked. In addition the issue of price supports is not one which Mr. Levitt discussed in his direct examination and, of course, is not a part of the litigation before you at this time.

(Mr. Woodstock) Your Honor, the man is an economic consultant. Exxon has offered him as an expert, he's an economic consultant to the marketing of petroleum products. My question involved an historically used pricing method which the court has sustained as being legal and also it involved the method of operation which is specifically going to be prohibited by the statute. I've also clarified the question to include what Mr. Noonberg's previous objection was to identify the people in the hypothetical as being supplied by a competing supplier. Now beyond that I'm a little bit at loss as to how to phrase the question and also—

(Court) Well, probably what his advice would be.

(T. 225) (Mr. Woodstock) I believe that's what I asked you. What would you advise me as a consultant?

(Court) Do you have enough information to go on to form a conclusion, Mr. Levitt? A. I have, Your Honor, I think enough information provided I think that it is understood that we're talking about a rather broad general situation and not specific—

(Court) Certainly, go ahead.

A. The question used the phrase efficient—what would be the most efficient plan.

Q. And I'm talking of cost efficiency demand. A. Precisely and the most efficient way, it seems to me, would be to do it in the former rather than in the latter of your two alternatives, and that it is to respond to the situation in the given competitive area by offering allowances in those areas because the response to those areas, in response to competitive situation in that area. Where you understand by efficiency, as you say, cost efficient. There are prices and costs that come with operating as we've described before dealer full service retail service stations on a selier, company operated basis. They could not function on a seller and operative basis—on a full service basis. Indeed if they could and if the oil companies felt that that would be the most efficient way it was doing—that to operate there was (T. 226) nothing in the world now which prevents them from operating them as salaried owned—as salaried stations. The reason they don't operate them as salaried stations because precisely it is more efficient given the mix products the consumers want out of those full service stations to operate them on a dealer basis. There's every incentive in the world to operate them on a company basis except one and it doesn't pay.

Q. Don't they in fact market—operate conventional service stations on a company basis in the State of Maryland, some actors that you're familiar with? A. Six point seven percent of their stations.

Q. Are conventional stations? A. No, no, not conventional, oh, substantial larger—smaller proportion of those. It's—it's twenty-two out of five hundred and thirty-two conventional stations.

Q. Are you speaking of Exxon only now? A. Yes, sir.

Q. Are you familiar with Phillips Petroleum in the State of Maryland? A. Yes, sir, not in the same detail as in Exxon.

Q. Do you know what type of operation they have? A. They have a mix.

Q. Yes, they do. Are you familiar with the number of company stations that Phillips has?

(T. 227) (Mr. Noonberg) Well, if you're testing him about the—

(Mr. Woodstock) No—

(Mr. Noonberg)—facts in the pretrial order, I think he ought to have it in front of him. It's all spelled out in the pretrial order. I don't think you're entitled to test his recollection about the specific numbers.

(Court) No, I would think you would give him a pretrial order. Otherwise all you're doing is testing his memory as to how well he remembers a pretrial order.

(Mr. Woodstock) Your Honor, the question is going to eventually lead to the method of operation by Phillips and they have company owned and operated stations.

I'll withdraw the question.

Q. I'd like you to, a little bit more brief perhaps, run me through without the examples, run me through the wheel of retailing theory again that you explained on direct examination; and I'd specifically like you to limit it to as it applies to retailing of petroleum products. A. I said the retailing—the history of the retailing of petroleum products is a history which is very similar to the history of retailing phenomenon in lots of other products and that is you have a new institution created. As you know, the first retail service stations tended to be a store front, (T. 228) grocery stores with a gas pump in front of them because they were single—the number of cars on the road increased and those early days when the service

requirements were very high because you had flat tires every four miles and all kinds of other breakdowns, it became obvious that in order to keep the cars moving—in order to keep the cars that you wanted to sell gasoline to moving, you had to have an institution which would keep them moving and that's how the service station started; and nobody put any money into it because nobody had any faith and the oil companies strated their own; and that's why the original petroleum gas stations as we know them today, the service stations, are company operated; and it was not until 1932 with the passage of the chain store act in Iowa—chain store acts all over the midwest that the oil companies moved in the direction of having company operated stations; and it turned out there was actually a movementt for the direct—in that direction anyhow I guess about, oh, twenty percent of them were affected anyhow. Well, it was an evolution is what I'm trying to suggest in the servicing. Now what happens is as a car's life is extended, as the frequency of repair requirements is less, as the quality of the products that the—the generic product, namely gasoline, becomes increasingly the same because the automobile demands and engine demands become (T. 229) increasingly the same, what you find is many, many fewer customers feel that they need to deal with stations that provided the total mix of services, and as they just respond entirely to price thinking that many of the products, the gasoline products from the different brands are identical or sufficiently similar to take very little risk in getting them from different places and so they go for single—they become very price responsive and that's where that new institution came from; and that's very similar to what happened in supermarkets, very similar to what happened in department stores, very similar to what happened in mass merchandising.

Q. Well, let me take you back to the beginning of that wheel. We had nobody would put money in so the major oil companies built their own stations and operated them. At what point in time as the wheel turned, did you get these innovative marketers that you've mentioned when you were first describing your wheel of retailing, the spur lines I believe you said that type? A. Oh, those came mostly in the early 30s—there were a few of them around in the early 30s. We began to see quite a lot of them in the latter part of the 1930s and great explosion of them after World War II.

Q. In the beginning the true innovators, were they producer refiners or were they just non-producers and refiners (T. 230) like you and I? A. The true innovators were the guys who created the good service station in the beginning.

Q. No, I'm not talking about— A. —talk about, if you want to talk about that.

Q. Talking about the type of marketer that came along— A. You mean the price setter.

Q. Right. A. All right.

Q. Those people and that wheel as it was turning, the wheel of retailing, the people that changed the style of marketing away from the— A. Well, they didn't change entirely. I mean in Maryland the private branders have twenty-four point eight percent of the market, and they just —the dominant form is still one of the major brand styles. The—these spur operations, those trackside operation where as—historically true retailing, by the way—

Q. I— A. People who are—from external to the central segment of the industry.

Q. All right. Why would you and I believe you testified that this wheel of retailing theory envision the things keep happening again and again. I imagine part of

this is (T. 231) this is what contributes to innovations in the market, is that correct? A. That is–

Q. And that certain trends– A. That is–

Q. –repeat themselves, right. A. That is.

Q. What makes you think that if there was a prohibition on company owned and operated service stations that these would not be displaced by this same type of independent retailer that came along back in 1930? A. I don't know what will happen. All I know is that you're impeding a sort of a natural evolutionary force. I–it has happened historically constant in the past. There have been these new firms that have been created, they have integrated backwards and become big firms. This sort of constant or as Schumpeter called it the perennial gale of innovations. It's constantly there. To intrude through legislation of some sort and says here is the form that evolution cannot take or here is some people who are to be excluded from the opportunity of providing the kind of innovations from entry from the kind of expermentation that I've talked about seems to me to be almost suicidal, to destroy one potential segment of consumer benefitting innovation without any visible (T. 232) benefit would be the opposite to the society. Obviously anti-competitive, it's obviously anti-consumer it seems to me on that basis. I don't see where you're going to come out in doing that.

Q. Well, would that– A. It simply shows that the opposite is going to–if you leave that particular segment, if you leave it alone, you've got lots of activity going on.

Q. Would that be your opinion as to any type of government regulation or law which required divestiture of integrated firms? A. No, sir.

Q. How about the Hepburn Act? Are you familiar with that act, sir? A. No, sir.

Q. Required–how about certain–CAB? A. Yes, sir.

Q. Are you familiar with any of their regulations– A. Yes, sir.

Q. –which prohibit air carriers from doing other things? Do you think that's a good regulation?

(Mr. Noonberg) Objection.

A. Well, don't–I do.

(Court) I think we're getting way out of (T. 233) the ball park now, Mr. Woodstock.

(Mr. Woodstock) Your Honor, maybe if we can break for lunch and I'll regroup my notes then and try to come back and clean this up.

(Court) I think that would be a good idea. We'll adjourn to one thirty.

Professor, since you're under examination, you may not discuss your testimony in any way with anyone involved in this case over the luncheon recess.

(Recess)

(Court) Mr. Woodstock.

CROSS EXAMINATION (Continued)

By Mr. Woodstock:

Q. Dr. Levitt, you're still under oath. I believe in your direct testimony you said with regards to Paragraphs B and C of the Act which is involved in this litigation that if it was put into effect, one of the things it would do, which would be adverse to competition, would be to erect barriers to new entry. Is that correct? A. Yes, sir.

Q. I believe you also pointed to the fact for evidence of your previous statement that on Luberg's list or Lumberg's listings there was approximately thirty-seven integrated companies of which only five operated in Maryland, is that correct? (T. 234) A. Yes, sir.

Q. Can you tell me if you have any direct information or evidence of the fact that any of the remaining thirty-two who didn't market in Maryland had intentions

of coming to market—to market in Maryland? A. Among those thirty-two I have no evidence. Among the remaining couple hundred, I think in the group three classes—categories, some are—

Q. But we're talking about— A. —in—are marketers only.

Q. —the thirty-seven that you identified in Lumberg. A. No, sir, I do not.

Q. Do you have any information relative as to why they never marketed in Maryland before this legislation was passed? A. No, I do not.

Q. It would be your testimony then that to the best of your knowledge, this law has absolutely no effect as to their marketing decision as of today, to not market in Maryland. A. To the best of my knowledge.

Q. May I ask your opinion please as a expert, economist and—how you feel about the effect of government enforced price controls as to how that affects the normal economic forces, for example, in the retail marketing of petroleum? And I specifically would like a response rather explaining (T. 235) whether it's a negative or a positive contribution? A. The current controls? The ones you are referring?

Q. Okay, you can work with those, yes. A. I think current controls clearly, you can read it in the trade press and speeches and you can infer it from other things, the current controls have tended to put a damper on any—on most new investment activity in the retail marketplace simply because of the uncertainty as to length and the uncertainty as to the stipulations—uncertainty as to their duration and the uncertainty as to the stipulation if they are extended.

Q. Would it be your opinion that the economy involved in the marketing of petroleum products would be better off without any government price controls? A.

Without any government price controls? Ah, you mean now or—

Q. I'll— A. Under what conditions?

Q. If I may, I'll narrow it down. With the present price controls as they would apply to the retail marketing of petroleum as opposed to crude oil prices. A. Well, let's tie it into crude oil prices.

Q. Okay, well, give me your opinion on both then.

(Discussion regarding being able to hear Mr. Woodstock).

(T. 236) Q. I believe we asked your opinion regarding the effects on retail marketing of petroleum prices at current price controls. A. The effects, I thought I answered that—

Q. Whether or not— A. I didn't—

Q. Whether or not it would be better off without them. A. Oh, whether we'd be better off without them. Well, I think so long as we've got the crude controls then—and the allocations in the—of crude that there might be some presumption because of the artificialities created under those circumstances, that you might be better off having some protection spelled in in the form of controls. They're sort of past the relations as you know, they're not controls in any absolute sense. There are numerous complex provisions regarding what can be passed on and what cannot so there's a great deal of flexibility in that, but the design of the flexibility is to prevent differential consequences based upon the fact of the existence of these crude controls.

Q. And would it be your opinion—well, let me ask you is there, in your opinion, a connection between the supply situation for crude oil which is ultimately refined and the ultimate price of gasoline that we've seen in the marketplace for the last couple months? A. I think there is.

(T. 237) Q. What would be the nature of that relationship? If I may, for example, suggest to you that if within the next six months the supply situation became much brighter and supply was available on a much broader basis at perhaps even a lower price. A. Crude?

Q. Crude. What would be the effect upon, the ultimate effect upon retail prices? A. I think you'd have some greater instability of retail prices as we already do, as you know; there is—there is plenty surplus product around now. All you have to do is read PLATT'S OILGRAM and look at the spot prices and you can see that there are surpluses now in products.

Q. Is the price the same as our domestic sweet crude? A. Price of what?

Q. At—the available refined product that's available on the spot market, is it somewhat equal in price as the refined product that comes from domestically refined crude? A. No, it isn't because the controls in the allocations are such as to prevent that.

Q. Is there a price difference? A. No.

Q. There's none because of the control. A. No, because of the makeup relationships in the (T. 238) allocation system.

Q. Without the equilibrium enforced upon the controls but prior to the controls were implemented— A. Well—

Q. —was there a difference between the domestic crude and the foreign imported crude? A. Insofar as what is concerned?

Q. The price of it? A. Of what, of the crude?

Q. Yes. A. Yeah, not all domestic crudes are the same, as you know.

Q. Right. A. Yeah, there were differences.

Q. Was it a substantial difference? If you know, if you don't know, tell me and I'll— A. By comparison of the

difference today, it would not be very substantial.

Q. Then is it your testimony that this availability of supply is also directly related to the ultimate price of refined product that's sold in the retail market, is that correct? A. Yes.

Q. You've testified to that? (T. 239) A. Yes.

Q. If the supply situation changed favorably tomorrow, would you assume that the prices could possibly go down, the retail market? A. Supply situation as well as the price?

Q. I'm asking you— A. Speak up please.

Q. —if more supply would be connected to prices. If the supply and the prices of supply went down. A. You have to do both because—

Q. Right. A. Because of the controlling situation. I—let me give you my best estimate if I can. Obvious I don't know what's absolute—

Q. I'd like your estimate— A. My best estimate—

Q. —with controls and without controls. A. Well, you're talking about without control, my best estimate is—well, with controls my best estimate is that we would not have the very substantial difference in general level of product prices now because we have for the increasingly in the last four, five, six months experienced product surplus and there's already been a very substantial variations—nobody now argues that there isn't enough crude (T. 240) around. Nobody now argues that there's insufficient product around and you can see that, what's happening in retail prices; so if there were a substantially more crude, I don't know, I don't think I would go very far in assuming that there would be a substantial reduction beyond what the surplus has already created. I don't know, that's a guess. We've already taken a lot out of it already.

(Mr. Woodstock) I have no further questions at this time, Your Honor.

REDIRECT EXAMINATION

By Mr. Noonberg:

Q. Dr. Levitt, just a couple of quick questions. You indicated in response to one of Mr. Woodstock's questions that the share of the market that the price marketers had I think you used and the term was twenty-six percent or something like that. A. Twenty-four point eight.

Q. Twenty-four point eight percent. Could you identify is that the Maryland market, the national market or what? A. That's the Maryland market and the source of the data is right in the pretrial order in Exhibit C.

Q. Well, Professor Levitt, what I was going to ask you next was are you aware of whether or not that percentage has increased or decreased over the last few years? A. Yes, in 1969 the independent—the price marketers (T. 241) market share was fourteen point two so in the matter of five years between '69 and '72, it's increased to twenty-four point eight which is a seventy-eight percent increase in the market share of price marketers in Maryland in the last six years.

(Mr. Noonberg) No further questions.

(Mr. Woodstock) I have a few.

RECROSS EXAMINATION

By Mr. Woodstock:

Q. Who would you identify on this list as price marketers? Is this the list you're referring to? A. That, sir, is the list. Ashland, all of those stations are price marketers, BP, the Coastal States which supplies Crown.

Q. Excuse me? A. Which supplies in part Crown, gets its supplies from others; Hess, Louisville, Southern States, Tenneco and Multiple Sources. I think you will find if you add up the 1969 numbers for those and 1975, you

will get fourteen point two in '69 and twenty-four point eight in 1975.

Q. Dr. Levitt, based on your familiarity with the Maryland market, how many service stations does Tenneco have in the State of Maryland? A. Excuse me, what do you mean by have, sir, may I have a clarification on that? Branded under the Tenneco brand you (T. 242) mean?

Q. Yes. A. I think that's in that Exhibit B.

Q. Yes. How many are there? A. Zero according to this.

Q. Doctor, based on your knowledge of the Maryland market, how many service stations does Coastal States have in the State of Maryland? If I can find it, I'll let you look at the list. A. Coastal States has zero.

Q. How many does Louisville Refining have? A. Zero.

Q. Do you have any idea based on your knowledge of the Maryland market where the gasoline that's taxable on a first sale basis you've identified as sales goes to or how it's dispensed ultimately to the consumer in the State of Maryland? A. Yes, I do.

Q. Where does Louisville's gasoline get sold from?

(Court) Well, didn't he say that Louisville just had no stations in Maryland?

(Mr. Woodstock) Yes, he's testified as to the effect of sales in Maryland, Your Honor, and I believe that it carried the inference that these were sales to the consumer and this man has—he identified the people as price marketers. (T. 243) Well, they may be price marketers in the sense that they're wholesalers. They may not be price marketers. The concept of a price marketer has previously been identified by this witness as one who sells at traditionally a lower price than the retail market or under the major—

(Court) Well, if the company that he's talking about has none, then why should it be material as to where it gets its supply?

(Mr. Woodstock) Well, it's significant—well, if that's included within the percentages of price marketers' sales, then it's not—he cannot trace it to ultimate sales to the consumer, it shouldn't be classified as within that percentages of price marketer sales.

(Court) Well, I still don't understand why it's necessary to ask him where it gets gas from.

(Mr. Woodstock) If I may—

(Mr. Noonberg) If Your Honor please, I think I can explain this somewhat. The witness testified that according to Table C the share of the price marketer has increased over the last five to six years.

(Court) That's right.

(Mr. Noonberg) Mr. Woodstock has converted that question into asking whether suppliers had retail stations, but the supplier may not have a retail station such as Tenneco (T. 244) does not have a retail station but it supplies and sells to those who are price marketers and that's why the relationship that I expressed to you in this—at the opening statement, we can't get the exact numbers because they're just not available, but the best information is we know, for example, or Professor Levitt knows who Tenneco sells to or who ultimately gets these products and they are the ones who are classified as price marketers.

(Court) Well, I guess I shouldn't have asked the question because it's taken up more time than it's worth; so go ahead and go back.

Q. Is it your understanding, Dr. Levitt, of the figures of percentage of taxable motor vehicle fuel sales in Maryland by oil companies that every sale recorded on

here resulted in product being distributed to consumers in the State of Maryland? A. No, sir.

Q. Do you have any idea how many of the gallons of gasoline that these percentages indicate were subsequently transported out of the State of Maryland? A. I know the classifications are consistent between 1969 and '75, and I think that's the matter that counts. There are different data, the Lumberg data, which do it a different way but these Lumberg data have not been submitted (T. 245) and you've not certified to those facts so I didn't want to produce them. It's substantially the same. The Lumberg data gives you a percentage increase which is almost the same. The Lumberg data percentage increase is about sixty-eight percent versus that number being seventy-three percent so it's very close, consistent I think it seems to me.

Q. Upon what does Mr. Lumberg base his information, his factual information? A. Lumberg heavily does telephone interviewing, asking people what brand they bought last time.

Q. That's his primary source of sales data from the respective— A. Sales—all you have to do is get purchase data, consumer purchase data and you ask somebody what did you buy last time and they say I bought Crown, that's the best indication of what brand they bought as opposed to looking it up in the sales records.

Q. Are you aware of Mr. Lumberg's Share of the Market Reports? A. Yes, sir.

Q. What do those reports reflect with regards to the data contained therein? A. He—reports—there are different kinds—different kinds of share of the market. He lists the same ones that (T. 246) you have here. He also developed some bas—he also developed share of market data on the basis of not on tax rolls but on the basis of telephone interviews.

Q. Where does he obtain his primary information as opposed from secondary information? A. Telephone interviews.

Q. To the best of your knowledge as an expert on oil marketing, does Mr. Lumberg in any way use and obtain taxable–percentage of taxable motor vehicle fuel sales from the various states? A. Yes, he does.

Q. Does he do so from Maryland? A. Yes, he does.

Q. Does Mr. Lumberg purport in his use of those figures to be able to–to be able to account for every gallon of gasoline within those first taxable sales that it's being sold within that particular state for which the taxable sales is reported? A. Can I explain exactly the difference? Mr. Lumberg does not presume that the two are identical. He does not presume that the market share of any given reporter of tax revenue is represented by the volume on which he paid taxes in that state, that the volume–he doesn't presume that. That's why he really reports two different data. He reports (T. 247) the data based on these and reports data on telephone interviews, it is a very common way of getting market share data, which has what people actually bought, here is what the taxes would be. Those two things will always be different for precisely the reason we indicated. Some of it gets shipped out of the state and some of it gets shipped in internal ways that we're not aware of. Some of them are not even sold as retail. Some of them go to industrial users, some of them go the runstruck fleets, some of them go for farming funds and not to the retail consumer. So that's why those differences exist; and one of the reasons, I'm not entirely sure why all the reasons as he makes those calculations, I think there's some interesting, useful data that for purposes of internal management companies who want to know what those numbers are and he's just a handy way of collecting those

numbers from the state tax rolls because it's cheaper for a company to pay one person to collect them for all rather than each one of them trotting to the State House and collecting them separately.

Q. One last question. Are you able to look at that document and state under oath that every–

(Court) Now that document, identify it for the record. Table C, sir.

(Mr. Woodstock) Table C of the pretrial order.

(T. 248) (Court) All right.

(Mr. Woodstock) And it's the Taxable Sales Reported by the Gasoline Sales Tax Division.

Q. Are you able to state that all of those taxable sales and in particular those by the companies you identified resulted in sales by price cutters–by price cutting or price competitiors within the State of Maryland? A. I can say with a high degree of confidence that the overwhelming proportion of the product from those five sellers goes into that segment of the retail gasoline market which uses price as its major competitive weapon.

Q. And on what is that based? What information would that be? A. This is my–based on my studies.

Q. What studies of the Maryland market and Maryland taxable sales? A. You'll recall that I've indicated earlier I had among my discussions with people here in Maryland I discussed supply situations, determine who sells what to whom and on the basis of those discussions and in the–on the basis of those discussions and indeed on the basis of my past experience knowing something about the marketing strategy of these companies particularly in themselves, I know, for example, what generally the marketing strategy of Tenneco is, generally (T. 249) what Ashland is and generally know the BP operations–on the basis of those things, the information I got from Maryland sources as to where their product went was

consistent with what I know about their particular strategy.

Q. Can you give me a round figure, if you would, of the number of terminaling and exchange agreements that are in existence by just the Plaintiffs in this case that are on file with the Gas Tax Division of the State of Maryland? A. I have no idea.

Q. Do you know what an exchange agreement is? A. Yes, sir.

Q. And a terminaling agreement? A. Yes, sir.

Q. You have no idea how many of those are right now on file being utilized in the State of Maryland? A. No, I don't.

(Mr. Woodstock) No further questions.

(Mr. Reid) May it please the court–

(Court) Mr. Reid

(Mr. Reid)–name is Richard Reid. I represent Petroleum Marketing Corporation and Commonwealth Oil Refining Company. Could I ask a question, the witness a question?

(Court) Yes, sir.

(T. 250) CROSS EXAMINATION

By Mr. Reid:

Q. Dr. Levitt, you testified that the price marketers in the State of Maryland are twenty-four point eight percent of the market, I believe? A. Yes, sir.

Q. And then you were asked who make up that–

(Mr. Preston) You read from this list which is C.

Q. Who made up the price marketers and I didn't hear Petroleum Marketing Corporation named which sells under the Scot brand. Was that just an error on your part? A. Exhibit C does not include–most of that source my understanding comes from Commonwealth. Petro-

leum Marketing Corporation comes from Commonwealth Refining and that's not on this table.

Q. Petroleum, excuse me Petroleum– A. No, Petroleum Marketing is on this table, right.

Q. Correct? On the table. A. Yeah, as a matter of fact, that–that–you're quite right. I neglected that. That's twenty-one point–the twenty-four point eight includes Petroleum Marketing.

(Mr. Reid) Thank you very much.

A. Yeah, it does, clearly does.

CROSS EXAMINATION

By Mr. Preston:

Q. Let me ask you the same question with regard to (T. 251) Continental, Professor Levitt, who, as you know, market only Kayo at retail here in Maryland. A. Yes, sir.

Q. Does it also include that? A. Yes, sir.

* * *

By Mr. Greenwald:

(T. 255) * * * We propose to offer the expert testimony of Dr. Charles H. Berry, who is a professor of economics and public affairs at both the Department of Economics and the Woodrow Wilson School of Princeton University. Dr. Berry has had a long and I might say a distinquished career as a consultant with a view toward viewing the impact of a variety of programs, certainly not limited to the petroleum industry upon the consumer. His essential outlook is how does a given economics program affect the consumer. That's what he as experienced and practice and that's what he has taught; and you will hear from him some of the courses that he teaches which emphasize the tools of the professional economist engaged in how a given program act upon the consumer. Now Dr. Berry will offer an interesting contrast to Dr. Levitt whom you have heard earlier. Dr.

Levitt was able to offer to the court an incisive kind of analysis based upon expertise in the marketing specifically the petroleum marketing industry. Dr. Berry does not purport to have any such expertise. His point of view Your Honor, will be that of the professional economist without any particular expertise of the petroleum marketing situation. Rather he will employ the tools of analysis used by the professional economist to bear upon this particular legislation which he has reviewed and offer Your Honor his reasons as to what the effect of this Act upon the Maryland (T. 256) consumer will be and the basis for these conclusions.

Basically I believe, indeed I hope that Professor Berry will be testifying that the divestiture portions of the Act, Paragraphs B and C, by removing a type of competitor from the market, by preventing future entry in terms of both forward and backward integration is anti-consumer, anti-competitive and will probably result in higher prices.

* * *

(T. 256) (Affidavit of George W. Ruppersberger filed herewith as evidence as Plaintiffs' Exhibit No. 4).

(Mr. Greenwald) Also as a preliminary matter, Your Honor, the pretrial order on Page 15 refers to the stipulated facts concerning Gulf as Appendix D, D as in delta. As it was actually typed up, the reference is to Appendix B and I would simply like the record to reflect that it is Appendix D that relates to Gulf's stipulated facts.

I'd now like to call Dr. Charles H. Berry.

(T. 257) CHARLES HORACE BERRY,

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47, and 77-64

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY,

SHELL OIL COMPANY,

CONTINENTAL OIL COMPANY and KAYO OIL COMPANY,

GULF OIL CORPORATION,

ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC. and PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPENDIX

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APPEALS DOCKETED JULY 1, 8 AND 11, 1977

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Supplemental Opinion of the Court of Appeals of Maryland dated April 13, 1977 is printed at 279 Md. 456 (advance reports) and at 372 A.2d 237 and appears in the Joint Appendix to Jurisdictional Statements at pages 45a to 48a.

(Witness) My name is Charles Horace Berry, I live at 47 Maclean Circle in Princeton, New Jersey.

DIRECT EXAMINATION

By Mr. Greenwald:

Q. Dr. Berry, you hold a Ph. D. in economics from the University of Chicago, is that correct? A. That's correct.

Q. And do you currently hold a teaching position? A. Yes, I do.

Q. Where is that teaching position? A. At Princeton University.

Q. At any particular school at Princeton? A. My appointment is in the University as professor of economics and public affairs. That's a joint appointment. I'm a professor of economics for the Economics Department and a professor of public affairs within the Woodrow Wilson School of Public and International Affairs; and the title reflects the fact that it's an appointment in each of the two departments as it were.

* * *

(T. 261) (Dr. Berry's resume (Curriculum citae) filed herewith as Plaintiffs' Exhibit No. 5).

Q. Dr. Berry, have you ever testified from the professional economist's point of view as to the validity of diverstiture legislation related to the petroleum industry? A. To the validity of it?

Q. Yes, as to whether from an economist's point of view this is anti-consumer legislation or pro-consumer legislation? A. I've testified as to the desirability of legislation of that sort on one occasion, yes.

(T. 262) Q. Would you share with us the circumstances under which you've so testified? A. About a year ago, a little bit more than a year ago, I was asked by Assemblyman Baer of the State of New Jersey to appear before his committee of the Assembly and give my

reaction as a disinterested outsider but as somebody concerned with analyzing this type of policy proposal as to the desirability for the consumers population in New Jersey of adopting of a bill which restricted refiners and distributors of petroleum products from operating retail facilities within the state and I did so I believe in September of last year.

Q. Were you sponsored or supported by any particular interest group in offering this testimony? A. No, I was asked specifically by Assemblyman Baer to come in as somebody who was not directly involved in any way with the—with those hearings or with the development of that bill or with its advocates and to react independently and give the committee my judgment with respect to whether it was a good bill for the consumers and residents of the state. I did so in exactly that spirit.

Q. Were you paid for your analysis of this proposed New Jersey legislation or for your testimony? A. No, I did it because I was asked to do it by Mr. Baer.

* * *

(T. 269) Q. Now, Dr. Berry, you've been retained by Gulf Oil Corporation to act as an expert in this case, is that correct? A. That's correct.

Q. And you're being paid for your efforts, is that correct? A. Yes, I am.

Q. Basically Gulf has requested that you review the legislation at issue here particularly Paragraphs B and C of Chapter 854 of the Laws of Maryland 1974 from the point of view of the consuming public, is that correct? A. That's correct.

Q. Have you made such a review?

(Mr. Woodstock) Objection, Your Honor.

(Court) All right, sir.

(Mr. Woodstock) I don't believe that the witness has been qualified sufficiently to testify as to this legislation,

number one, with regards to petroleum marketing; number two, what the effects of vertical integration in the retail marketing of Maryland, number three, as a consumer expert with regards to consumers within the State of Maryland.

(Court) Overruled.

* * *

(T. 270) Q. Have you made such a review of Paragraphs B and C of the Laws of Chapter 854 of the Laws of Maryland 1974? A. Yes, I have.

Q. All right, and have you reached any conclusion based upon your expertise as a professional economist whether Paragraphs B and C will benefit or hurt the Maryland consumer? A. Yes, I have.

Q. What is that conclusion? A. I think that the effect of the implementation of this law will be adverse to the interests of the consumers in the State of Maryland.

Q. Why do you say that, Dr. Berry? A. I think if—I think that the statute if implemented would have three quite separate and, of course, related effects which would operate in the direction of lessening the intensity of competition primarily within the retailing of petroleum products within the state, possibly within the refining of the product within the country and that as a consequence of both of these effects each of them operates in the same direction, each would tend to alleviate downward pressure on the price of petroleum products which would otherwise be present (T. 271) and, therefore, would operate to the disadvantage of the consumers of petroleum products within the state, quite possibly also outside the state; and I can amplify that a little bit if you would like.

Q. Yes, would you please explain exactly how in your opinion the Paragraphs B and C of the statute— A. Well, as I—

Q. —accomplish that. A. As I understand the content of Paragraphs B and C, there would be basically three things. It would require that a certain class competitor currently active at the retail level within the State of Maryland would have to either divest themselves of refining interests outside the state, create them within the state or have to cease activity as retailers within the state.

Secondly, no refiner or producer of crude petroleum anywhere in the country would be permitted under these statutes—under these paragraphs if effected to enter the state at the retail—in terms of the retail distribution of petroleum products and that would constitute a complete barrier to entry. That's prohibition with respect to entry.

For both those reasons whatever regulatory impact of with respect to maintain margins low may be present regarding non-integrated—I'm sorry integrated companies operating at (T. 272) the retail level within the state now and the impact of any integrated refiner which might integrate to the state would be lost. Therefore, the net direction of those two effects would be to reduce the vitality of competition at the retail level within the state. In addition, no retailer active in the petroleum industry within the state would under this statute be permitted to integrate backwards to acquire position in either refining or production while maintaining his position within the state and that would exclude that class of competitors from the potential entry at the refining—at the refining level, and the direction of that effect is also clear. It cannot improve vitality of competition at the refining level. It might quite possibly lessen it and once again for that reason the regulatory pressure, power of competition to control prices at the wholesale level would also be lost. I put these both together and the direction of any effect in the aggregate, combining the impact would be towards higher prices. In other words prohibiting, establishing

those two bars to entry and excluding a particular class of competitors presently within the market would have the net effect, I think, if any, of increasing the price of petroleum products at retail.

Q. In your judgment is there any particular advantage to the consuming public in permitting company operated stations? A. Yes, I think there are, but that's really just the (T. 273) mere image of the undesirability of excluding a particular class of competitor from the industry at retail. It seems to me that one always—that one ought to be very concerned whenever a particular class of competitor is removed from a market and it seems to me that in the retailing of petroleum products of this sort and retailing of products of any sort, it's highly desirable to let every potential and actual competitor compete within that market so that the full array of possible methods of retailing a product may be preserved. In the cases of the petroleum industry it's a rather peculiar industry in that the basic product, which I take it is gasoline, is typically retailed in conjunction with a range of the different types and associated services, ranging from very liberal to a great deal, ranging from a lower price, for example, at a perhaps net thoroughly desirable location to a higher price at a very convenient location. It's important—it's important if that market is to operate satisfactorily that as much opportunity to move in and offer whatever type of package particular retailer feels is appropriate, particular seller feels is appropriate so the consumers can register their choice within that market; and it's only by having that array of options open to the consumer the consumer by reacting will signal to the sellers of the product in question what it is that he wants so that that marketer in fact can respond to that.

(T. 274) If one excludes a particular class of competitor, that means that some type of outlet may be lost, the potential for consumers to react to that may be lost, the market may act less perfectly than it otherwise would.

Q. Are you able to offer us an example of a situation in which the consumer did lose for a period of time the opportunity to make a choice? A. I'm not sure that I can offer a precise—well, perhaps I can. Let me offer, if I may, two quick illustrations. One that comes to mind is the situation which existed in this country prior to the introduction of small foreign-built motor cars, particularly Volkswagens. There had been some debate prior to that time about what it was consumers really wanted and it was alleged that the manufacturers felt that consumers wanted large, powerful automobiles. They did not—they did not provide—domestic producers did not provide a viable option in terms of the small foreign car, but a potential competitor, a German manufacturer, came in with another sort package a small Volkswagen which also was reliable and there was a response within the American market; and the large domestic producers lost sales to the new entrant, Volkswagen, and what we've seen since that time for the past fifteen or twenty years is a response of the American producers to that competition; and it's become even more dramatic I think in (T. 275) recent years, that the presence of a new option within that market resulted in a dramatic shift within—in terms of the type of product that was made available. It's transportation in a different package. The same thing could happen within the petroleum industry, different packages presented in terms of that in fact people prefer that to what existed previously. They respond by moving in that direction. I would expect producers to respond by providing more of that type facilities. Very important

that one not say you can't move in and try and experiment because if you do, it may never be apparent what in fact it is the consumer in fact would respond to. I heard earlier I think today in this court there was mention of the discount house which is the same type of thing. Here's an innovation which somebody thought of and it turned out that this was a particular package of service plus product people preferred to the type of offer which existed previously. There was a response not only on the part of consumers but also subsequent response in terms of the types of packages of retail goods which became available.

That's the type of fluidity which one wants to maintain within these markets and that's the type of fluidity which may be impinged if one says you may not enter this market arbitrarily; and it seems to me that these two barriers, barrier to entry by the refiner, producer at the retail level, (T. 276) barrier to entry at the refiner, producer level in the case of the retailer only and the exclusion of that particular sect, producers and sellers from that market now would offer—would tend to offer only in the direction of reducing that fluidity, reducing that flexibility and making those markets work less perfectly; and therefore, not in the interests of the consumers without any question.

Q. In your judgment as a professional economist is the retail gasoline market currently a competitive market? A. Yes—

(Mr. Woodstock) Objection.

(Court) What's the objection?

(Mr. Woodstock) The objection is based on I don't believe he's testified that he's done any studies of the competitive market or retail sales of gasoline.

(Court) Have you, sir? A. I'm sorry, sir?

(Court) Have you conducted any study of the market of gasoline so as to be able to determine whether or not it is competitive? A. I've conducted no study but in the type of work that we do, the structural characteristics that are associated with the competitive industry are such that I think that I can answer that question.

(T. 277) (Court) All right, sir, go ahead.

A. My answer would be yes that as a professional economist, as somebody concerned with industrial organization the retailing of petroleum products under normal circumstances and I'd like to say here and now that I'm by no means an expert with respect to the existent controls that are imposed on this industry either at that level or at any prior level. The structure of that industry is such that it would be expected to be highly competitive. I say that because the number of firms competiting in it is by any measure very large. There are very many different actors in that particular industry, in varying degrees. It is not dominated by any single entity. The establishments themselves create no barrier to entry by virtue of the enormous financial cost which is associated with creating one. One might argue, for example, if you're talking about refining, the modern refinery is so expensive that the problem of accumulating sufficient funds to build it would create a barrier to entry. No such barrier exists with respect to the retailing of petroleum products. There are many different types, many different prices. I think that it's possible to answer that question simply by casual observation without having a detailed study of whether it's competitive or not competitive. Another way to look at it is that it must be obvious to everyone in this court room (T. 278) that his option with respect to where he can get petroleum products at retail even within Annapolis are relatively large. There are lots of outlets. He can shop, the

information with respect to the pricing he will have to pay at each of them is not hard to find, it's posted. The costs of getting additional information are not great. That's the type of situation in which industry is necessarily going to be competitive and it will remain competitive absent the type of regulation which begins to exclude competitors and prevent the competitive process from continuing.

Q. When you say that he is able to choose among the variety— A. He or she.

Q. He or she, who do you mean? A. The consumer.

Q. All right. In your judgment as a professional economist would the vertically integrated oil companies be motivated to drive out competition at the retail level?

* * *

(T. 279) A. Let me answer, Mr. Greenwald, first by making clear what it is that we're coming to in analyzing a situation of this sort. Our assumption is typically that the corporation wants either to maximize its income or typically to maximize its sales subject to some income restraint maintaining its income at some target of rate of return; and under those circumstances it's in the interest of the producer of a product such as petroleum, it would be under those circumstances in the interest of the producer of a product such as petroleum to (T. 280) maintain the highest degree of efficiency at the retailing level as possible. In other words to have his—have the costs that he bears for the retailing of his product whether he does that by doing the job himself or whether he does that by hiring somebody to do it for him by selling him the product and letting him resell it at least cost. It would not be in his interest under those circumstances to drive out more—a more efficient retailer of his product in terms of an independent sector solely to

be vertically integrated. He would have an incentive to integrate forward if he could do the job more efficiently at smaller margins which would imply other things being equal lower prices for consumers and, therefore, higher sales. He would not have an incentive to drive out independents, for example, or to integrate forward exclusively if he were not more efficient in so doing. If he were less efficient, he would cost them money; and if he would cost them money, I would assume that that would not be in the interest of a vertically integrated corporation.

I can give you a numeric illustration of that, if you would like, if it would help or if it's clear from what I've said, I'd be happy to leave it at that.

Q. Why don't you give us a brief illustration, if you will? A. Well, let me suppose the formula, I'll make it—(T. 281) I'll make it very unrealistic and very simple so that the analytics will become clear.

Suppose that we have a—suppose we're talking about gasoline and we're talking about the sale of the gasoline only, we're not talking about a situation where there are lots of different services combined with it just to keep it simple. We have a producer who has some crude and who has some refined gasoline which ultimately will be sold to consumers over some area. We have the gasoline at some central point. The gasoline at retail wherever he sells it, another unrealistic assumption, let's suppose will sell at a dollar. Our refiner has the refined product, it will sell throughout the country at a dollar. The question is, you know, what's it worth to him. Now if his options are only to hire somebody to take it to the consumer and to sell it to them at a payment of twenty cents a gallon, that petroleum is worth to him at his refinery eighty cents, a dollar less the twenty cents. That's the income. Now if in fact he himself could make the investment in the

facilities, provide the transportation and get it to that consumer at a cost of fifteen cents, would clearly be worth more to him. It would be worth eighty-five cents to him, a dollar less fifteen cents as opposed to eighty cents a dollar less the twenty cents and under those circumstances you would expect a profit making a corporation go forward, (T. 282) do the job itself because it's more efficient. Okay?

Alternatively, suppose that he's not more efficient at it, suppose that the market, that those independent dealers are much better at adjusting to the demands of the consumers wherever they are and if he does the job himself, it costs him twenty-five cents whereas he can hire them to do the job for him at twenty cents. Under those circumstances he would have absolutely no incentive to integrate forward vertically. It would cost him money and I would predict that he would not do it. Now the real question is which of those two alternatives exist within the particular market where vertical integration is at issue. The answer is frequently you don't know. Frequently the corporation may not know and so that one frequently will observe both types of retailing activity going on simultaneously. Now what that does is give the seller of the refined product or the product at wholesale, whatever it is, an indication with respect to the efficiency of his own operation and is judged by the efficiency of independents and the efficiency of independents is judged by what he knows about his own operation. It also gives him the flexibility to experiment, to see whether with different techniques he can't do better, provide something which the independents would emulate, subsequent would demonstrate to him—to them that this would improve this very technique. If you deny the option of integration, you (T. 283) deny that check,

you deny that element in terms of competition at the retail level, the likelihood of the consumer will be the ultimate loser.

I can—there are other I can expand on if you like.

Q. No, I think that's sufficient, thank you.

Suppose that if the vertically integrated oil companies embarked upon company operated retail outlets in a large way, a number of independents would inevitably be hurt. Wouldn't this in your judgment adversely affect competition? A. I think my answer to that, Mr. Greenwald, is that one must be very, very careful to differentiate between an adverse effect upon competition and an adverse effect on competitors. A competitor is in competition and with intense competition and with an increase in competition, it's quite possible the competitors can get hurt. It's a very bad mistake though it's a frequent one, it's a very bad mistake to infer that because a particular competitor is losing ground that competition has been lessened and that the consumer is being hurt. Quite frequently it's the other way around. Let me make that clear by going back to an earlier illustration. I spoke earlier about the introduction of Volkswagen as a new competitor within the United States.

Competition I think all of us would agree was heightened by the presence of that new competitor with a (T. 284) different technique of providing travel services to the American public. The domestic corporations got hurt. They lost the market share, their earnings went down, a couple went under; and subsequently the American manufacturers have responded by revising their notions about what type of product it is that they can sell efficiently within this market. The foreign market gets hurt. Each of those tools increased the efficiency of competition within those markets. In each case somebody got hurt, but the consumer was the beneficiary and

by the very nature of the competitive process there are always going to be winners and there are going to be losers; but what one must be sure is that no class is artifically protected from the competition of another group of competitors if one wants to preserve that type of competition; and in the case I just illustrated if one had said we're not going to let foreign cars be sold in the United States, that would have protected the domestic producers, that would have hurt the domestic consumer.

The discount stores which I also heard mentioned in here earlier are another illustration. With the arrival of the discount store, the department stores got hurt; and the department stores started to respond by becoming in part discount stores, the discount stores got hurt. The consumer was the ultimate beneficiary. Competition was increased but (T. 285) the process of the increased competition frequently does hurt some competitors and one ought to be very careful not to simply look to what happens to the competitor and say competition has been lessened. Look at the development of the super market. The super market came in, it was an innovation in terms of the retailing of food products. We have an enormous impact on corner stores.

Q. Corner grocery? A. Corner groceries stores or if we're talking about discount drug markets, they have an impact on the corner drug store. One could have jumped to the conclusion that because those competitors are dropping out that there is a decrease in competition within the industry, the competition has been—as it's been lessened, not true. Competition was heightened. Margins came down, some competitors went by the wayside. The consumer was the ultimate beneficiary and the whole process of analyzing this type of problem involved looking at the way in which resources—resources that are used in providing the types of services are

organized and we use in this system the competitive process to ensure that there is a gain to those who are efficient and a cost to those who are inefficient in terms of their place within the marketplace; and that process has to be maintained if those signals are to mean anything to corporations indicating to those how in (T. 286) fact they should conduct their affairs in accordance with the wishes, interests and demand of consumers.

Q. Dr. Berry, in your judgment as a professional economist do Paragraphs B and C of the legislation at issue have supporting them any rationale which could justify them as promoting the public welfare?

(Mr. Woodstock) Objection, Your Honor. I believe that what's good for the public welfare and the consumer—

(Court) Well, yes, I think you're right. If you rephrase the question, perhaps you can—

Q. Dr. Berry, in your judgment do Paragraphs B and C of the challenged legislation have any rationale to support them as promoting the Maryland consuming public?

(Mr. Woodstock) Objection, Your Honor.

(Court) Overruled.

(Mr. Woodstock) I don't understand—overruled.

A. Do you—if you mean looking at the provisions of these two paragraphs in this statute, can I find—do I have any form of explanation which would lead me to believe that an enactment or making those provisions effective could operate to the benefit of the consumers in the State of Maryland? My answer is no. I think the effect would be quite the opposite. I think it's very difficult to say that there would be an enormous and immediate effect but the direction and the effect (T. 287) is clear. It seems to me this is the type—this is the type of restriction which can only operate in the direction of lessening competition and that can only result in a lessening of the

regulatory impact of that device in terms of providing what the consumer wants efficiently and that means at low prices, I think.

* * *

(T. 287) CROSS EXAMINATION

By Mr. Woodstock:

Q. Dr. Berry? A. Yes, sir.

Q. My name is John Woodstock, Assistant Attorney General representing the State in these proceedings.

Dr. Berry, you've given us a lot of testimony on the effects of B and C. I'd like to ask you a few questions about some of the broad concepts that you have discussed. Can you think of any situations where vertical integration would perhaps be anti-competitive? A. Well, I can give you I think two situations have been (T. 288) rather special situations where there are let's say a very large-single, let me make it extreme and then we'll make a case I think stronger where there is a firm which is a monopolist, a single producer of a particular product, selling that product to a monopolist, which is the sole buyer of that product, if those two firms were to merge, it would seem to me it would make it more difficult for an outside firm to come in and compete within that industry since the outside firm coming in would by its very nature have to enter simultaneously at both levels; and if the capital costs were high at both, we're talking about establishing, for example, a manufacturer of motor car engines and a manufacturer of motor car exhausts, it would be more difficult for an outside competitor to come in because of the amount of capital required for entrance would be greater as a consequence of the fact that he would then have to come in at both levels or not at all. So that might be an example of a barrier to entry which would be a consequence of a vertical integration.

That's one situation where one might say one would like to keep those two firms separate because the likelihood that the monopolist would integrate forward to avoid the monopolist or the monopolist might prefer to integrate backward to avoid the monopolist; and there are situations of that sort in the- if you look at my writing, you will see that (T. 289) I've considered that type of situation.

The other situation where professional economists would be concerned about vertical integration does not relate to the vigor of competition. It relates to situations where competition is absent because of the exclusive right which is given to corporations who operate within that particular area; and I can give you a concrete illustration of the situation of that sort. Bell Telephone Company is given exclusive rights to sell telephone service in many parts of the country; and that—the price at which it may sell this is regulated locally. If that company were to integrate backward into the manufacture of telephone equipment as in fact AT&T has done through its ownership of Western Electric. That makes the regulatory process more difficult because you then have to inquire about the fairness of the price of the manufactured equipment as well; and in that type situation indeed one would have to raise the question of whether one wanted integration in that context so it's not really related to the question of competition. So I would say that the first illustration is really the most applicable one to your question.

* * *

(T. 290) Q. Isn't it true that when you speak of a vertical acquisition, part of—as part of vertical integration, aren't you in fact describing a system which does not ultimately result in an increase in the number of competitors? In fact doesn't it, if anything, would either

keep the number stable or (T. 291) possibly if the vertical acquisition was comprised of three small competitors that way, it would reduce the number of competitors? A. That's correct.

Q. That's somewhat—do you adhere to the theory that the more the competitors the better the marketplace? A. I adhere to the proposition that if a market is to behave competitively, it must have many competitors.

Q. Well— A. So that if we're talking about an acquisition of one of several hundred or several thousand, the answer is that's not apt to be significant. If on the other hand, this illustration we're talking about involved a firm vertically integrating forward and acquiring let's say thirty, forty percent of the market, at the subsequent stage, yes, one begins to worry about that. The concern is not with the vertical integration in that context, the concern is with the horizontal integration because in that illustration you gave me it would be the firm which was vertically integrated. We also had the horizontal integration at subsequent stages three independent competitors were put together and I would be worried about the horizontal tie, that that consolidation at a single level began to get large relative to the market. If it's not that large relative to market, then the (T. 292) market is basically competitive and then my earlier illustration about, you know, what the effect of vertical integration would still stand.

Q. May I ask you—do you want to say more? A. No.

Q. * * * Have you ever undertaken any consumer studies or investigations relating to specific consumer preferences in the type of retailing in—of gasoline products? A. None that amounted to anything.

Q. Then your testimony with regards to consumer preferences today was based on general information from other areas, is that correct? A. Based—based then

basically on my training as an economist without—I don't intend for one minute to tell you that I'm an expert with respect to the —even this petroleum market or petroleum market nationwide.

* * *

(T. 294) Q. In your economic—expert economic opinion, would it be—is it necessary for the major oil companies to have fully vert—to fully vertically integrate into the direct operation at the retail level? A. Well, I really feel with respect to that question as phrased that I should say that I don't know because I'm not an expert in terms of what's necessary within the industry. I don't know the industry from the inside out. My expectation is that in general as Mr. Greenwald has mentioned what a corporation of this sort will do is pursue alternative strategy and my expectation would be that in something like the use of the automobile one might find under those circumstances that a company operating its own dealership, in other situations offering it through franchise dealers simply because in some circumstances one form of obtaining retail services is superior to the other. In some cases it might be that the corporation might be able to do the job more efficiently in selling, selling just adjacent, for example, to its factory, it might be convenient administratively in organi- (T. 295) zations simply to operate it directly. You get—alternatively these things are being retailed in some distant part of the country where control is optive, I guess that under those circumstances the balance would tend to go toward the independent. Again it's not in—It's in the interest of the seller of the product to find the most efficient way of getting his product to the people who want it in the form in which they want it and frequently that will be by using independent dealers by selling the product to them, letting them resell it or setting them up as independent,

you know, franchise dealers in some fashion. I don't mean to argue that under any circumstances any prior—one can know that this or that system is the best.

(Mr. Woodstock) I have no further questions of this witness. Your Honor.

(Court) All right, sir.

(Mr. Greenwald) No further questions, Your Honor.

(Court) All right, you can step down.

* * *

(T. 302) (Mr. Reid) We'd like to offer to the court a photograph that was taken, we can top the one that you've just referred to, these were taken in 1972. Price is shown in the thirty cent range.

(Photograph Filed Herewith As Evidence As Plaintiffs' Exhibit No. 7A through 7C)

(Mr. Reid) Secondly we'd like to offer the affidavit, Mr. Kelvey, relates to the investment of Petroleum Marketing Corporation in building and equipment in the State of Maryland both as to the initial investment and as to the current book value thereof.

(Affidavit Filed Herewith As Evidence As Plaintiffs' Exhibit No. 8)

(Mr. Reid) We have in addition two witnesses to testify, one briefly, Mr. Colin Carter, Commonwealth Oil Refining Company, Inc., second, Mr. Theodore Ferguson, Petroleum Marketing Corporation. First call Mr. Colin Carter.

(T. 303) COLIN P. CARTER,

a witness of lawful age after being duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Reid:

Q. State your full name please. A. My name is Colin P. Carter.

Q. What is your address? A. 51 Crawford Terrace, Riverside, Connecticut.

Q. What is your relation to Commonwealth Oil Refining Company, Inc.? A. I am distribution planning manager in the head office in Park Avenue.

Q. What are your qualifications and background for that position? A. I was educated in England. I'm a professional chemist. I was employed in England by BP and Esso in positions involving market research, marketing general economics and specifically in the last two years in operations planning. I was hired by Commonwealth Oil from England in 1970 to become operations planning manager at their refinery in Penuelas, Puerto Rico.

Q. Does Commonwealth Oil Refining Company, Inc. have any other refineries other than the one in Puerto Rico? A. No.

Q. Does it have any production capacity? (T. 304) A. Production of crude oil, none.

Q. Are you familiar with the history of the relationship between Commonwealth Oil Refining Company, Inc. and Petroleum Marketing Corporation? A. Reasonably, yes.

Q. Would you explain that please? A. The negotiations for a merger begun in 1969. They were completed in the first quarter of 1970 and Petroleum Marketing Corporation became a subsidiary of Commonwealth Oil Refining Company.

Q. And that is a wholly owned subsidiary? A. Became a wholly owned subsidiary.

Q. Are you familiar with the operations of Petroleum Marketing Corporation in the retail gasoline market? A. I have some knowledge of their operations, yes.

Q. Where does Commonwealth obtain its crude oil? A. Historically it's obtained its crude oil almost entirely in

the Carribean. Beginning in 1971 we began to obtain our crude oil from other parts of the world. We now obtain approximately seventy, seventy to—about seventy percent of our crude oil in the Carribean, the balance in the rest of the world, largely Africa.

Q. What has happened to the foreign crude oil market in recent years? (T. 305) A. From the onset of CFXC what today seems a relatively small increase leading to the dramatic increase that came about in the end of '73 that—well, particularly the end of '73 and right at the beginning of 1974. In fact, I at your request I prepared a chart showing crude costs and in fact showing how other costs associated with getting gasoline through to the public have changed since 1969.

Q. Is that the chart on the easel there? A. That is the chart on the easel.

Q. Would you explain the chart to the court please?

* * *

(T. 305) A. This is a plot of costs. The blue is crude oil costs in terms of dollars per barrel with this scale here. This one is dollars per barrel. This one is the same scale just expressed in terms of cents per gallon. Here we have the years 1969 through '75. The orange above the blue represents the plot of refinery operating costs. This is in fact added to those. There's crude costs added to this then becoming the operating costs. The green is freight costs from Puerto (T. 306) Rico to the east coast. The pink represents a plot of PMC operating costs expressed in terms of either dollars per barrel or cents per gallon. The brown portion represents the taxes. I have shown each of them sequentially. The implication would be that this represents the cost of gasoline. That isn't true. This represents the addition of all the costs that can be associated with it, but in fact gasoline has to bear more than its share of the costs for the reason that if you like

residual fuel, which is one of the other products from crude oil, tends not to. You cannot avoid making basically three products from crude oil so this is in a sense a simplification, but it does represent in sequence the costs Commonwealth Oil has had over this period; and I have also shown on the graph a plot of our PMC pump price, weighted average pump price over the whole system, this isn't just the Maryland pump price, to emphasize the problems specifically that Commonwealth Oil has had because of this foreign crude.

Q. What effect has the increased in the cost of foreign crude and other increases had with respect to the pump price of Scot gasoline? A. The price of Scot gasoline in competition with everybody else had to go up. However, Scot gasoline has to be competitive and I think the graph really makes the rest of (T. 307) that particular point. Beginning with 1975 you can see the improvement with the onset of the crude equalization program, but that gap is still significantly less than this one.

Q. And this one being around 1971, '72? A. Yes, going through—right through.

Q. Directing your attention to the block of 1974, does the chart indicate that Scot gasoline was for a period of time sold below cost? A. This certainly would since as I said before, if anything, gasoline has to bear a high cost in this one. Yes, this would show this.

Q. Some of the lines as they become vertical become narrow which indicate—I draw your attention specifically to taxes which get narrow in this area. Does that indicate that the taxes were less there for instance? A. No, in fact what you're plotting it, of course, the vertical height and this apparent narrowness is a result of—really what you're plotting there if you like is a time difference, a relatively small time difference, so it plots a rapid changeover of small time distance. No, the thing that is significant

would be dropping a pump line, a vertical line right down there where if you could imagine this push flatter, you'd see in fact that taxes have tended to increase all along, as virtually all those costs have. Sorry, I think I was (T. 308) looking at operating costs, not taxes that time, but same plot.

CROSS EXAMINATION

By Mr. Woodstock:

Q. Let me ask you with regards to that chart, what does taxes indicate? All taxes, what taxes are—what taxes are indicated— A. Those are all the taxes that are added onto the pump price, the—both federal and state taxes.

Q. Does that reflect just Maryland's or is that— A. That is—no, those are all taxes for the whole system. That is a plot of the whole Scot system. Obtaining the historical data particularly just for the State of Maryland would have been difficult, so we plotted the whole PMC system, which is basically centered in this area.

Q. How many states is that? A. Seven states, seven states I believe.

(Mr. Reid) We'd offer the chart as an exhibit, if the court please.

(Court) All right, sir.

(Cost factor changes chart filed herewith as Plaintiffs' (T. 309) Exhibit No. 9 as evidence)

THEODORE E. FERGUSON,

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) State your full name and address.

(Witness) Theodore E. Ferguson. 1703 Hicks Drive, Vienna, Virginia.

DIRECT EXAMINATION

By Mr. Reid:

Q. Mr. Ferguson, what is your position with Petroleum Marketing Corporation? A. I'm executive vice president.

Q. How long—in what areas of the operation are under your supervision? A. I'm chief executive officer of the company and that's inclusive of retail and wholesale marketing, going down through the organizational chart covering real estate, operations, accounting groups report to my office, the entire organization of Petroleum Marketing.

Q. How long have you held that position? A. For approximately—approximately four and a half (T. 310) years.

Q. Incidentally, where is your office? A. It's 7900 West Park Drive in McLean, Virginia.

Q. Is that the main office of Petroleum Marketing Corporation? A. That's our corporate headquarters, yes.

Q. What are your qualifications for the position you hold with the Petroleum Marketing Corporation? A. Well, I've attended school at the University of Florida, I was two years with Tidewater Oil Company, which is presently known as Getty Oil Company, even prior to that I was a Cities Service dealer and, of course, I've been with the company for fifteen years. I have come through the ranks so to speak from a retail service station supervisor, servicing anywhere from twelve to seventeen or to even seven stations in the beginning through retail sales manager, vice president of retail sales and holding within the company supply and distribution functions, overall marketing functions and then executive vice president.

Q. Have you been with the company since its inception? A. No, I've not. I came with the company in 1960. That's approximately four years after it was formed. When I came with it, we were very small. We had approximately six stations, primarily in Maryland and about six under construction, (T. 311) some of those being in Maryland and some in Virginia. In fact our corporate headquarters were in Pasadena in the rear of a service station prior to my coming to it, and then about six months before I came, they were in the process of moving and moved to the Investment Building in Washington; and that was the beginning of the company.

Q. Who was he founder of the company? A. Norman C. Keith. The company was, as I say, founded on a Delaware corporation, but was founded here in Maryland with the first two stations opening, one in Towson, one in Pasadena and then growing from there from two stations to when I came with the company, we'll call it about thirteen and now we're up to a hundred and forty some stations and property.

Q. How many of those are in Maryland? A. Twenty-one stations in Maryland.

Q. How does Petroleum Marketing Corporation participate in the retail markets for the sale of gasoline? A. We're a what we would call a high volume outlet. Some people would call them cut rate, some would call them highly competitive. We think of ourselves as an independent marketer. We are highly competitive in the market. We operate on the basis of the public, what we think they need to gain their patronage, which has been as large a property as we could find; and as competitive prices as we could find. We have (T. 312) what we think is a somewhat of a different image and I think that the gentleman prior to me emphasized that each company has its own marketing method or motif, and I think he

called it market retail force or something; and I think that this is what we have developed. We have developed our own. It might vary by degrees but I think it is the entire package that makes for a successful high volume stations which is what we have done.

Q. Specifically do you participate through dealership operations or are your stations company operated? A. We're one hundred percent company operated. We have in the past and from our conception experimented as we have had the right to do and we have done this and found that the company operation was the best method for us to obtain objectives and to maximize the profits.

Q. What are the various factors which you see that go into the particular type of company operation as Scot runs or the PMC runs through the Scot stations? A. Well, I think being somewhat redundant, I think that one, I think our competitive approach is the most important to us in obtaining the volume that we need to justify our investments and then following along we need control of that operation which sometimes is construed to be nasty but I'm using this in the sense of controlling that price to be competitive (T. 313) and then it doesn't miss one thing in the operation, it goes on to your uniforms, it goes on to your hours of operation, how your station is maintained, how your people are trained, how you approach, what sort of advertising you permit, what type of advertising you don't like, do you—what do you permit on that station, what—it's an overall image I think is what I'm really trying to say; and we have developed that with policies, with training and so forth to obtain these volumes where we think it—we think it's us and we think it's successful and basically we've proven that not just by making dollars because we're losing a few on your chart there, but throughout the years we have been successful, and we have done it by taking our ups and

downs in the marketplace relative to profit making to maintain this image.

Q. Incidentally could a dealer take these ups and downs that you're talking about? A. In the last few years he'd have pretty hard time of it. Even in my period of time with the company, we have had and we felt it was an advantage by being company operated in that we have many periods of time and it might stretch for four and five months at a time where we will break even with slight losses. Call that—call it changing dollars. I think that if you go back in the dealer operations in the period of time that I'm talking about coming up with company dealer (T. 314) turnover was just one of the biggest jobs that anybody in the oil company had to do was replacement of dealers. I think even the federal government has reflected in four and five years ago the most vulnerable business in the country for bankruptcy was the service station. I think all our ends of operation have avoided that from our standpoint; and I really don't think that generally this—in our position relative to our crude costs that a dealer could have sustained it. I don't feel I could have personally.

* * *

(T. 314) Q. All right, may I start again? I'm going to ask you about each of the factors that you just testified to with respect to the overall image necessary to be a high volume, low cost operation and ask you how Petroleum Marketing Corporation controls the price of the gasoline that is offered to sale to the public and included in that answer please tell us how your price relates to the price of the major oil companies. A. Well, I'll start with the latter. We're approximately two cents below major brand competition. This varies, of course, (T. 315) from station to station, but I think on an average we're probably two cents to two two. It might be one seven for the moment

and I think that pricing in marketing is the thing of the moment, but to be fair on the average I would say we're from one to two cents below major competition and I mean to say those offering full service, bays, tire repairs, batteries and so forth. Since we don't off this type of thing, we're gas, easy in, easy out type of operation.

Q. Why is that differential necessary in order to sell Scot gasoline? A. Well, we need the volume because our operation, our—I think what I'm trying to say is that particularly with our manufacturing costs we've got to maximize the profit. Since we became associated with the refiner, I think this has even become more apparent and, of course, the world situation hasn't helped us; and I think that particularly at this time we have to maximize them, which I think the chart even bears out to just stay alive.

Q. Do you think Scot gasoline would have appeal to the motoring public if it was priced at the same price as the major brands? A. Well, from my experience, I would probably estimate, which is very presumptuous, but I'd probably lose seventy percent of my volume if I tried to market at major brand prices. (T. 316) We've had some experience where we've tried it. Going back four or five years ago, we tried this, we've experimented with it. We—to show you we even tried experimenting with the service. We probably were one of the pioneers in this area with what these fellas call a—earlier car care center. I had three of them. It didn't work. Our image just didn't lend itself to this. We finally ended up closing these and going back to our traditional company operated stations, high volume, easy in, easy out, personnel type operation.

Q. The second thing I think you mentioned was hours of operation. What is the policy of Petroleum Marketing Corporation with respect to the hours the stations operate? A. We generally like to after taking field surveys

of what competition has established per hour of operation, we try to stay open, open an hour earlier, close an hour later. Also as a rule of thumb policy, after evaluating the traffic, the market conditions and the volume and our experience at that location, our basic aim is to operate on a twenty-four hour basis. We found that this lends itself to control, helps us establish the volumes that we need and become a more efficient operation.

Q. How do you control the method of operation at a Scot station? A. We have a management team, consists of vice president (T. 317) of retail, he in turn has district managers and supervisors report to the district managers. Generally our people will supervise on the basis of six to eight stations. Because of the nature of our operations, because we are a cash business primarily, it's necessary that we control the money, we control these things that we think are necessary to keep our image, that being the hours, checking that the station is open, training the personnel, keeping good looking equipment, having—making sure the stations are washed down and going through what we think is general maintenance and upkeep necessary for operation, therefore, we back it up with personnel that might sound like a lot of people but it's actually minimum.

Q. Do you provide uniforms, for instance, for your attendants? A. Yes, we do, we have a company color, red pants and white shirts and red jackets and red caps; and when possible black bowties and so forth; and this is one of their jobs to try to maintain this image.

Q. How do you assure that these people will present a good appearance at all times as far as having clean clothes, things like that? A. We do their laundry for them.

Q. You pay for the cost of cleaning the clothes? A.

Yes, we do; we pay the costs and we provide the men (T. 318) with a change of uniform daily.

Q. Do you have any service facilities whatsoever at any of your twenty-one stations in Maryland? A. No, we're—where we have taken over stations with bays, we have removed the lifts and I believe that there were only about seven of those and blocked up the bays and have used these bays for the storage of our oil and merchandising signs and so forth; more in our maintenance area than for anything else. We just don't offer facilities.

Q. Do you sell tires, batteries or other accessories at your stations? A. No, we don't.

Q. Why don't you provide maintenance services and TBA sales? A. Well, we—we have—we have a philosophy that we think and I believe it's beared itself out that this may be an age of specialties. I think that if you're going to wait on people and we have found that about forty percent of our customers are women, we feel that it takes a clean type of personnel, clean appearing, we didn't feel that we could it with mechanical work. There are some other reasons which are basic and possibly important. To develop the company to the size that we have, quite a few of the zoning ordinances and at the hearings where we presented our case, (T. 319) they prohibited us from doing mechanical work, storing tow trucks and in a couple instances, it is in our zoning that we will not do any mechanical work, we will not wash cars, and many attempts have even been to regulate our hours of operation. But some thinking has changed since the embargo, but I haven't been in for zoning since then.

Q. Couldn't you enter into an arrangement with a dealer whereby he would agree to these same factors that you've just mentioned a certain price, a certain hours of operation, wearing the company uniform, things of that

nature? A. Well, under the present regulations as I've been advised by several attorneys that it would be impossible to put a man into the station and require that—of this independent businessman that he maintain hours or even wear a uniform and in many cases I think it's not even—I'm not sure that whether he'd have to buy our product or not. So I don't feel along with some other problems that we're faced with and that I don't believe that I could offer him a price for gasoline that he could live with, I think it would be absolutely impossible for Scot to go to a dealer operation and anywhere near get a return on investment that would allow us to stay alive or to grow.

Q. Does Petroleum Marketing Corporation require its gasoline from Commonwealth Oil Refining Company, Inc.? (T. 320) A. Yes, we do.

Q. How is that delivered in the State of Maryland? A. It's delivered by ships in the Baltimore harbor and unloaded and placed into our storage tanks and then redistributed to the stations by either common carrier or our own leased trucks directly to the stations. It's one of our methods of operation. We've worked, I think, from the beginning to cut costs so that we could stay competitive in the market by acquiring this terminal I think that it—we felt at the time that it was one of our cost-cutting mechanisms; and again through our own trucking arrangement, we felt we kept our costs at a liveable level so that we could stay again competitive, and in addition to that to couple that supply cycle in our stations we have probably the largest storage tanks, the most—at least average wise that I know of in the entire country. We average throughout the entire country forty-three gallons—forty-three thousand gallons a station; and generally the new stations have eighty thousand gallons. This way it is economical for us. We do not have

to have deliveries day to day into that station. We can live for wnatever our business cycle is. It's another method. Again going back to the dealer, we're—we couldn't require the dealer to buy under this franchising laws and so forth in the quantities; and could say send us a hundred gallons or whatever commercially rea- (T. 321) sonable I guess; but we deliver in full tanker loads. Again maximizing our—

Q. Incidentally, how was PMC affected and how did it react during the so-called gasoline shortages of the early months of 1974? A. Obviously it's the embargo period you're talking about. We kept our stations open as long as we could. We were very fortunate to have supply and we only closed them down when it became unfashionable and almost immoral to stay open because they were saying turn down the lights and at first received criticism; and at that time I went along with the atmosphere of the country, and I did close some of the stations early. Also we went along with the President's proposal to alternate, for the closing of Sundays and then finally as the public and as supervisors of different counties because aware of what was really happening, we were one of the first to cooperate with them and I had personally received calls from Prince George's County, Montgomery County to keep stations open specifically on Sunday, which we did. We also gave preference to fire and police and I think we reacted rather well.

Q. How did that compare to most dealerships that were (T. 322) operating during that period of time? A. During that particular time I think that the dealer by being the individual in this, I think he was very conscious of his economics. He found an opportunity to close early, which he did. He also found that he could probably lay off some of his part-time or full-time people; and he worked through his allocation. I think as a company

I could be called and say yes, we'll do that even though it's not economical. I would have loved to operate those reduced hours. I could have sold the same amount of gasoline or more under reduced hours, but I think we did have a conscience and I think there is some advantage to be able to pick up a phone and say to the various parts of your operations we should do this to cooperate with the counties and so forth.

Q. You, of course, are familiar with the legislation that's the basis of this case. What would happen if to Petroleum Marketing Corporation if the legislation were enforced which would prohibit the operations by Petroleum Marketing Corporation of the Scot retail gasoline stations in the State of Maryland? A. Well, I think other than—I guess the growth would be completely out of the picture; and I believe that we would probably have to abandon our operations because I don't see—I've spent a lot of time pondering this and also working (T. 323) with Colin trying to develop what we had within our financial structure that would permit a dealership and basically just starting with the economic picture that we could not offer a tank wagon price that would be competitive. I'd say that Petroleum Marketing would end up out of the State of Maryland.

Q. And would you summarize then the reasons why Petroleum Marketing Corporation could not be converted to a dealership operation? A. In summary I would say the economics of a high—of the gallon of gasoline related to our high costs and our distribution system, remembering that our gasoline comes from Puerto Rico, which certainly adds close to two cents to it, another being the volume that it takes to support the economics of our entire operation. We require, I'd say, high volumes. In order to retain the high volume, we certainly have to be competitive and it could be construed to be super-

competitive, but competition is competition. Also the image that we need to project to obtain this not that always—price does not always do it alone; and I think these gentlemen this morning pointed this out; but we've tried to couple it; and I think we would lose that part of our image that would help us or damage us in our volume but at least towards our economic maximization of profits. I think, too, we would probably and I think without a doubt lose the economics of efficiency of (T. 324) running that station; and our outside sources of income are limited and majority of the properties are probably limited to the conversion to other restaurants or what have you. So there's no question we would be damaged; but restricting it to why we couldn't, I think that generally I have summarized it. I don't believe that we could—most any other circumstances than company operation maximize the profits in order to stay alive in the state.

Q. Looking at it from the other side of the coin, from the potential dealer, do you think that the—a dealer—a potential dealer would find appealing the operation of a Scot station as a dealership operation? A. Well, I think the typical dealer as we know the dealer, I don't know why he'd want it. As I say, we don't have any facilities. We have a small air compressor. We have no lifts. Just being redundant I'm afraid.

Q. No, go ahead, that's all right. Go ahead. A. But I don't believe the dealer could stay alive in there. He'd have to be relying particularly, strictly on a hundred percent gasoline and prohibited from doing any outside work, TBA et cetera that would be extra profits; and with a high dealer tank wagon, I think he would—he'd have to surrender very quickly.

Q. Do you think that he could sell gasoline to the (T. 325) motoring public at the differential that PMC has

been able to sell it, that is, two cents below the majors? A. At a loss? I wouldn't hardly think so.

Q. What about the initial investment a dealer would have in a station like Petroleum Marketing's Scot station? A. Well, the—I think the highest investment and this is somewhat conjecture, I guess, because I haven't found a way to do it to offer him this on an economic basis just from the purchase of the gasoline but to go behind that and say what does he purchase from me, well, does he purchase the gas. Fine. This would probably today I ask him to fill the tank, might run up to thirty-eight to forty thousand dollars, depending on the tax, how we handle that.

Q. Your taxes are larger than the average service station. A. Well, we have quite a few with eighty thousand gallons.

Q. And he'd have to make an investment in the gasoline in the tank. A. In the tanks.

Q. To begin with. A. That's cer— I would assume this because I haven't been able to develop this method that I would put a dealer in on. So I'm dealing in hypothetical structure here. If we (T. 326) adapted a few methods of operation that other companies have, we might sell him the pumps; and he would maintain them. That's why I say I'm really dealing in a fog to try and tell the court how I would structure this in that I've been unable to; but some companies have—the dealers do own the pumps. The pumps today are twelve hundred dollars a piece. We have eight of them. Some of ours are dual pumps. Some stations have twelve pumps so where do I stop with this economics. I'm not just saying I'm making up what I would want to sell him, but what method of operation I would come up to put a dealer in I've been unable to satisfactorily come up with it. So you're—my answer is very difficult, but it would be a considerable investment

on his part and I'm not too sure that he could make a return on it. He might do better in a savings and loan.

CROSS EXAMINATION

By Mr. Woodstock:

* * *

(T. 326) Q. I think I agree with almost all your statements as it regards the period of time '74 and perhaps early '75 when you obviously operating at a cost. If I understand this (T. 327) chart right, the price of the gasoline you would be supplying to a dealer, he would already be behind. A. True.

Q. Let me ask you if the same would be true the period of 1969, when your crude oil cost was significantly lower. A. If the same—your question is would the same thing—would he be losing—could he have done it in 1969?

Q. Yes. A. In general, I would say no. I might tell you what has happened and maybe a reason why. There were—back in '69, '70, even up into '71 if you made twenty-five points, this is one twenty-fifths of a penny on a gallon of gas when wage and hours were a dollar an hour, everything was small, your profits were small and you get it in volume; and I would say that that dealer would not have had the volume back then unless he had everything that we had. I don't believe he could have done it because that's where the period of time when the most dealers went out of business.

Q. Are you aware of any companies that made it during that period of time? A. Independents.

Q. Yes. (T. 328) A. On a dealer basis?

Q. On a dealer basis. A. I'm not aware of any.

Q. How about today in Maryland? A. Companies comparable to us? I don't know of any on a dealer basis.

Q. Are you familiar with the Crown operation? A. I

understand that Crown has—I thought that was a commission arrangement so I can't direct myself to their—

Q. How about Hess? A. I think Hess as I know it is a—defined by me as a commission agreement, defined by you and the government as a dealer.

Q. Well, no it's not. It's not defined by me at all. It's defined by the law. A. By the law.

Q. To your knowledge are they operating at a profit right now? A. I don't know that.

Q. You don't know that. Is Commonwealth Oil Company operating at a profit on the total aspects of all its refining operations? A. Not at present.

Q. It's operating at a loss? (T. 329) A. That's correct.

Q. If your crude costs were significantly lower and the way I read that chart everything else has remained relatively constant, the exception of your crude costs, would PMC or—well, PMC turn the same profit or the same rate of profit as it did in '68, '69 and '71? A. Very difficult to answer. All I can say is that there is a possibility.

Q. I'm basically asking you is if you did not incur those increased crude costs, wouldn't you—your profit picture absolutely without question be better. A. I think it would be down because—well, of course, the crude costs today are affecting utility bills and everything, so if you were—if you say that nothing in the economy went up, inflation didn't go, then everything remained the same, then I could probably answer yes. The cost of living, wages and so forth are eating into profits constantly whether crude goes or not.

Q. To the best of your knowledge I don't—to the best of my knowledge I don't believe you answered one question on direct. I believe you answered the second part of it but not the first part of it and I believe you

never did answer how does PMC control the price and set the price at its retail service stations. I believe you answered for the hours but you (T. 330) didn't answer for price. A. Okay, we survey the market; and I guess I should define that. We'll take the competition up and down the street, all of the gas stations in the area that would affect the buying habits of the motoring public in a particular area.

* * *

(T. 330) A. This is surveyed by our service station supervisors and district managers; and the information is passed along to our home office, vice president of retail discusses it with the either the field or the district passes the information along to me and we establish for that station that we feel to be a competitive price taking in all of the factors. Those factors being a mix of whatever we had surveyed from se'f service to full service to where we feel our relative position is to maintain the volume retaining our customers that are significant to our profit.

Q. Was Petroleum Marketing Corporation a profitable corporation prior to the time it was absorbed by Commonwealth? A. We were a—we were a viable entity, yes.

Q. Successful? (T. 331) A. I would say so, expanding.

Q. Growing? A. Yes.

Q. Growing. A. We found a need for crude. We were getting big enough that we needed supply.

Q. To the best of your knowledge when you set the price in the market, are you the lowest? A. No, I'm matching competition. I don't think that we would be called the lowest in the area. When we spot that price, we will match that price if it's significant to that station.

Q. If you decided—Maryland law B and C were upheld and you decided to convert to dealer leased operations, I believe you said you might do certain things. One of

them was what I believe was to the exclusion of other things, wouldn't you possibly consider extending credit to the gasoline in the ground as other major oil companies do to certain dealers?

* * *

(T. 332) A. I think this is certainly a factor that would have to be considered, in order for a company to do this, he would have to make cash arrangements to finance a dealer.

Q. How about renting him the equipment instead of selling it, including the pumps? A. These are all possibilities. This is done in a variety of companies today.

Q. Has Scot or I'm sorry, has PMC adopted the official corporate policy by a vote of their board of directors or by whatever means that if this law is upheld they will absolutely close up shop in the State of Maryland and not do business in the State of Maryland at retail? A. We have had no reason to this point to take it to our board.

Q. Does PMC also market petroleum at a wholesale level? A. Yes, we do.

Q. If B and C were upheld, wouldn't it be possible or would it be possible that PMC would continue to do business on that level? A. Well, we'd have to—we'd be faced with a very (T. 333) serious decision in that approximately sixty to seventy-five percent of our product that goes through the Baltimore terminal is destined for retail. I think that it would require an economic study to find if we should even remain in the harbor.

Q. Do you know— A. We have quite a few million dollars invested there.

Q. Do you make a profit selling it wholesale? A. On occasions.

Q. You actually do sell and not make a profit? A. That's correct. It's as competitive as the retail.

Q. What is the average monthly volume for the twenty-one Scot stations in Maryland? A. I would say approximately a hundred and ninety thousand. I'll have to use my company average. I haven't worked it out for the month. A hundred and ninety thousand gallons per station.

Q. Do you recall what it was in about 1969, 1970 and well, 1971? A. Without the record as to either one of the years, it was somewhere between '69 and '71 we had some averages that were ninety-eight to a hundred and two.

Q. At that time do you have any idea and I don't know whether you know this or not what your cost factors were as compared to other independent marketers similar to your (T. 334) operation? Are they same? A. What do you mean the same costs? Are you saying –

Q. The costs identified on that board. A. Well, in '71–'74, independents similar to us I would assume that our costs were slightly greater in that we're bringing the product from Puerto Rico. Others in similar situations probably were domestic oriented and did not have the freight included.

(Mr. Woodstock) I don't have any further questions, Your Honor.

* * *

(T. 336) OCTOBER 16, 1975

(Letter filed herewith as Plaintiffs' Exhibit No. 10A as evidence) (Affidavit and Exhibit filed herewith as Plaintiffs' Exhibit No. 10B as evidence).

(Original Affidavit filed herewith as Plaintiffs' Exhibit No. 10C as evidence).

(Court) All right, sir.

(Mr. Abrams) Your Honor, my name is Robert Abrams

and I'm an attorney for Shell Oil Company in this litigation.

The thrust, we believe, Your Honor, as the court has heard Plaintiffs' contentions concerning Paragraphs B and C of the Maryland Act, Shell's position is similar to that of other Plaintiffs in that it is Shell's belief that Paragraphs B and C are contrary to the interest of the petroleum products consumer and that they constitute an invalid exercise of the police power of this state. Insofar as Shell's legal contentions are concerned, Shell for the sake of brevity and this court's time will rely upon the joint brief filed in this action and adopt Mr. Noonberg's legal arguments presented with the opening of this case.

In terms of Shell's factual presentation, it is essentially divided into two parts, Your Honor, one part dealing with factual matters presented through the testimony (T. 337) of the company witness and I am happy in this regard to tell the court that the State through Mr. Woodstock and Shell have been able to reach an agreement in terms of an affidavit. The second part of Shell's case will be the expert testimony of, economic testimony of Dr. Matityahu Marcus. At this time, Your Honor, I'm going to offer into evidence the affidavit that I previously referred to and read to the court one paragraph of the cover letter to that affidavit.

(Court) All right, sir.

(Mr. Abrams) And that provides–and the letter is addressed to you, Your Honor.

"The affidavit and attached exhibits of Mr. Naughton, area manager for the southeast area of Shell Oil Company are being offered into evidence in Shell's case in chief in this action. The enclosed affidavit and exhibits were filed in lieu of either direct or cross examination pursuant to an agreement reached between counsel for Shell, counsel

for defendants as result of Your Honor's endorsement of such a procedure on August 22, 1975."

At this time, Your Honor, I would like to call Dr. Marcus to the stand.

(T. 338) DR. MATITYAHU MARCUS,
a witness of lawful age after being duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Abrams:

Q. Dr. Marcus, please state your full name and address. A. My name is Matityahu Marcus, spelled M A T I T Y A H U, Marcus, M A R C U S. I live at 771 Cranford Avenue, Westfield, New Jersey.

Q. Dr. Marcus, what is your present employment? A. I am a professor of economics at Rutgers University.

Q. Have you held any other positions at Rutgers University? A. Yes. Over the period 1970 to 1975 I have served as the chairman of the Department of Economics, as the director of graduate studies in economics and as the director of the Bureau of Economic Research at Rutgers University.

Q. Have you held any other teaching positions? A. Yes, I have been teaching before management groups at Rutgers, Rutgers has a program known as the Rutgers Advance Management Program and over the last several years I've been a regular speaker on the economics of business and regulation.

Q. What courses have you taught at Rutgers? A. I've taught quite a number of courses, but primarily in the area of pricing, in the area of industrial organization, financial theory and advanced seminars in the economics of (T. 339) regulation. I might add that the courses in

industrial organization which I've offered for a good number of years have been offered within our PhD program for graduate students.

Q. What does industrial organization cover? A. Industrial organization is that part of economics which is concerned with the relationship of the structure of industry by structure I mean the size of firms, the market share and its relation to the behavior of firms in terms of pricing and similar characteristics and ultimately tracing back through to its effect upon the performance of the industry from the vantage point of the economic interests of consumers.

Q. Dr. Marcus, would you state your educational background please? A. I hold a BA degree in economics which I obtained in 1959 and I hold a PhD degree in economics from Brown University which I obtained in 1963.

Q. Have you been a recipient of any honors or fellowships? A. I guess some. I graduated Phi Beta Kappa and magna cum laude. I have held post doctoral National Science Foundation fellowship and two years ago I was made an honorary professor by the university—the major university of Bolivia.

Q. What works, if any, have you published? A. Well, let me try and mention some of the publications in which my works have appeared, *The Review of Economics and* (T. 340) *Statistics, The Journal of Industrial Economics, The Anti-Trust Bulletin, The Southern Economic Journal, The Canadian Economic Journal, Land Economics, Journal of the American Institute Planners, Public Utilities Fortnightly, The Oxford Bulletin of Statistics,* and probably a few others which I can't—

Q. What kinds of subjects have you written about in these publications? A. I have written on diverse subjects,

but many of my works have dealt with the areas in which I have done the research over the years, in the area of industrial organization; and the kind of topics with which I've dealt include profitability and size of firm, market concentration in advertising, issues relating to the exit of firms, that is, mortality of firms, the determinants of growth of firms and the like.

Q. Dr. Marcus, have you given testimony regarding the economic effects of state legislation? A. Yes, I have.

Q. When did you give such testimony? A. I appeared before an assembly committee of the New Jersey Legislature about a year—over a year ago, September of '74 I believe; and at that time I presented my views on the desirability of a statute which sought to restructure the retail part of the gasoline marketing industry.

Q. On whose behalf did you appear? (T. 341) A. Well, I'd like to believe that I've appeared completely independently, I've appeared at the invitation of the chairman of the committee, Mr. Baer, the same person who has requested Professor Berry to appear before him.

Q. What were the circumstances surrounding Mr. Baer's contact with you? A. Well, actually I was contacted by a legislative aide of the committee. I believe it was in June or May and was asked whether I would come and give my views on that bill. At that time I was told that the committee was going to hold hearings within a period of two or three weeks; and I stated that I just couldn't do any sufficient study to present my views and I declined the invitation at that time.

Q. What happened subsequent to that? A. I was subsequently approached and was told that the hearings were delayed until September; and that gave me somewhat more time and I felt that I could present my opinions on the bill in September; and I agreed to appear.

Q. Were you compensated for that appearance in that state? A. No, I received no payment for this—for my time.

Q. Have you ever testified as to the economic effects or consequences of other government industry related actions? A. Yes, I have done so on several occasions.

(T. 342) Q. What were the areas of that testimony? A. I have testified on areas relating to pricing and areas relating to what is a fair and equitable rate of return on investments and on the area of future market demands.

Q. Where did you give such testimony? A. Here again I'm not sure I would be able to remember all of these appearances but probably most of them. I've appeared in the State of Virginia and at that time I was retained by the Attorney General of the Commonwealth of Virginia. I appeared in Alabama. At that time I was retained by the government of Alabama on behalf of the State of Alabama. I appeared in New York State on behalf of a group of large corporations. I appeared in Massachusetts on behalf of the Attorney General of Massachusetts. I appeared in New Jersey on several occasions on behalf of or that is I was retained by Rate Counsel which is division of the Public Advocate in New Jersey, division of the New Jersey State Government representing the public.

Q. Professor Marcus, have you ever engaged in private consulting? A. Yes, I have.

Q. In what areas? A. Again in order not to take too much time, let me just concentrate on what might be the more representative areas (T. 343) of my work. Prior to 1969, no, about 1967 or so, I was retained as a consultant by Mathematica, which is a Princeton-based consulting firm, to do a study for the Department of Agriculture. That study was concerned with market acceptance of—a market competition of man-made fibers

and cotton; and my assignment was to looking to the determinants which influence this acceptance and make some projections.

Subsequently to that I was a special consultant to National Economic Research Associates, which is a New York based consulting firm, for a number of years. I have worked on an assortment of problems, usually relating to the question of structure of industry and its relationship to behavior, performance in competition. In that connection I've dealt with marketing competition, marketing penetrations. I've dealt with a question of structure of the television supply industry, that was a study that was done for the Office of Telecommunications Policy with a view of exploring policy options for that office.

Q. Thank you. Dr. Marcus, could you describe the circumstances surrounding your initial relationship with Shell which has culminated in your appearance here today? A. Yes. I believe I was contacted by you sometime in the fall of 1974 and I was informed that I would be subpoenaed to present the statement which I had earlier presented to the (T. 344) New Jersey Legislature. I was deposed subsequently to that; and after the deposition I was asked whether I would undertake a study to form a basis for an opinion concerning the Maryland statute. I agreed to do so.

Q. Did you know the context within which that deposition was taken? A. Yes, I understood that the Florida Legislature had passed an act which sought again to restructure the retailing segment of petroleum marketing and in that context I understood that my statement was going to be used.

Q. Were you compensated for this deposition? A. I think I got six dollars from somebody.

Q. Prior to your retention by Shell for purposes of

this litigation, had you ever been retained by a petroleum company? A. No, sir.

Q. Dr. Marcus, are you familiar with Chapter 854 of the Laws of Maryland? A. Yes, I am.

Q. Have you had sufficient time to study Chapter 854 of the Laws of Maryland in order to form a definite opinion as to its economic effects? A. Yes, I have given it quite a bit of time.

Q. Is your opinion based on a study? A. Yes, it is.

(T. 345) Q. What constituted the basis of your study? A. Well, broadly speaking, of course, my study has begun with days of graduate work and subsequent research on industrial organization. These are precisely the issues that the study of industrial organization is concerned with. Entry, pricing and the like, but I sought to gain some more specific familiarity with gasoline marketing and retailing in order to be absolutely certain about my position on this matter and the rationale for it. So I have over the good many months now and I would dare say that actually my first study began in preparation for the New Jersey statement, however, at that time I told the committee that my study was ongoing, it was a kind of preliminary and still somewhat hasty statement. I have proceeded from that day on to study the industry. I've done it through giving it more emphasis in my graduate courses in industrial organization; and subsequent to being retained by Shell Oil I have systematically reviewed the literature including the academic literature as well as Congressional committee reports that have dealt with various facets of gasoline retailing. I'm not quite sure I've been able to cover them all, but I had a pretty heavy stack of books in front of me. I have followed the trade literatures. I have received a continuous stream of documents and manuscripts from your office which I

have endeavored to review, some of them with greater (T. 346) care and others more casually. I have also visited with Shell people in Houston trying to understand in greater detail the operations; and I was also very curious to see some of the different operations that they told me they had in Houston and just about one day I was driven around to see various stations which have not yet been introduced throughout the country.

Q. Now, Dr. Marcus, would you as an economist describe the frame of reference within which you approached your study? A. Well, the frame of reference here I think the same frame of reference of Professor Levitt and Professor Berry is the kind of reference that economists do employ and that is is it in the interest of the market as a whole, not is it in the interest of a particular segment, particular participant, but will consumers, will the public be better off next year, five years from now or ten years from now. This was the frame of reference on my study.

Q. Assuming Paragraph C, Chapter 854, becomes effective how will it in your opinion as an economist affect retail competition within the petroleum marketplace? A. It will tend to affect it adversely. It will tend to lessen competition and competition is the means, the only means I dare say, that we know through which in the long run consumers will benefit. I, therefore, conclude that it will tend to adversely affect consumer interests in the area of (T. 347) pricing, in the area of product development, in the area of innovation, in the area of service variety. I'd like to emphasize that this is not a statement of idealogy. Competition may appear to be a simple term, but it is through competition that all these elements are enhanced and this is why I've noted that.

Q. Since it is your opinion that competition is a fundamental consideration in terms of your analysis, would you state whether you believe gasoline retailing to be competitive generally? A. I'd like to relate it first to retailing as a whole because gasoline retailing is a segment of retailing. It's not a unique area; and retailing is considered to be one of the more competitive segments in American industry; and the reasons for it are fairly simple. Retailing is characterized by a large number of competing firms. Second, entry into retailing is relatively easy, relatively compared with manufacturing, public utilities and the like, that makes it more competitive. These factors characterize gasoline retailing as well, but it so happens that there are additional factors which make gasoline retailing even more competitive than retailing as a whole.

Q. What are these factors? A. Well, competition will tend to become more intense, (T. 348) the more substitutable are the products. Now gasoline brands while they are not perfect substitutes in the mind of the public are fairly close substitutes and that renders competition more viable. Second, in order to—for consumers to take advantage of competition, in order for them to behave competitively they must have price information, they must know which seller is selling less and in the gasoline industry it is almost a unique industry where price information is distributed in the most efficient way. All you have to do is down drive—drive down, excuse me, and you don't even have to do it on purpose, on the way to work you get a very quick assessment of what are the prices which the market quotes for you. This is a second very important consideration. Third, in order for consumers to take advantage of the different prices, they have to be able to act quickly without much restraint, without

a great deal of burden. Here again it's almost a unique industry because the consumer in his car he can do the purchase while in his car, he doesn't have to park his car, go up to the fourth floor, find out what's the price and then act on it. For all these reasons gasoline retailing is indeed highly competitive.

Q. What are the benefits, if any, of this competition to gasoline consumers? A. Well, I think I've mentioned that before already. (T. 349) With competition there comes the benefits of lower prices, greater product variety, better service quality, service innovations, product innovations because all these things become tools in the competitive contest.

Q. Now I'd like you to take each one of those tools and state in your opinion as an economist how each would be affected by Paragraph C of the Maryland Act. First what will be the effect, if any, of Paragraph C on the price of gasoline? A. Well, the effect will tend to reduce the price because you will be affecting, you will be impinging upon the number of stations and more importantly upon or as importantly upon–

(The Court) You say reduce? A. I'm sorry, I'm sorry, Your Honor, I misspoke. It would tend to reduce price–competition and increase overall the level of prices. This is a predictable result any time we preclude competitors from the marketplace.

Q. What type of competitor would be precluded from the marketplace? A. Well, according to the statute producer-refiners would be precluded from the marke- place.

Q. Who are these producers-refiners comprised of? A. Well, there's been evidence presented before this court that this group encompasses very large producer-refiners (T. 350) and some very small price competitors, price

marketers. This group of producer-refiners would have to terminate operations under this statute.

Q. What is the importance of having this type of competitor in the marketplace? A. Well, here again I think we have to think about the meaning of competition. Competition again depends on the participants, depends upon what they bring to bear. If you're going to have more types of participants in it, you're going to bring to bear more variety in managerial points of view, in attitude to product development, in strategy and as you bring these to bear, you allow consumers to choose more and this process of choice is really competition.

Q. Dr. Marcus, do you have an opinion as to whether Paragraphs B and C will affect market entry? A. Well, there's been extensive testimony before this court and I will be very, very brief. It is going to influence–to bar rather the entry of producer-refiners, it would bar the entry of producer-refiners who might ultimately choose to operate through dealers if they feel that in order to establish themselves they must first operate through company operated stations; and it will bar the forward integration of companies who are currently in refining from moving into marketing and I am sure there are marketing firms which may (T. 351) at some point or another be in danger or which may feel that economically they should move into refining and under this statute as I understand it, they would be prohibited from doing so. The net effect of these influences is to reduce potential entry into retailing–of the retailing industry.

Q. Returning now to the factors you previously mentioned, how would type or the quality of service be affected by Paragraph C? A. Again to have variety, you've got to have variety in the types of participants. You have to have as many diverse participants. If you're going to

limit, you're going to cut off some types. You're going to influence it adversely.

Q. You've also previously mentioned innovations. What is the importance of innovations to the consumer in your opinion? A. Here again I think innovations sometimes may be thought of as a kind of gadget, new packaging and sometimes it is that; but economists have established in numerous studies that over the history of the United States innovations have been the so—I think the most important source of productivity gains and productivity improvements; and productivity is the vehicle through which cost cutting gets effectuated and cost cutting is the foundation for lower prices. So innovations are of extreme importance.

Q. Now then would the prohibition against company operated (T. 352) stations affect innovations? A. Well, innovations do not just spring by somebody sitting on a chair. Sometimes it happens but I guess companies just can't be—assume that this is a safe strategy. The—it has been established that companies which seek innovations have to engage in research and development activity, known as R and D. Some of this research and development activity becomes fruitful and gets translated into usable and useful innovations. I believe that both the R and D activity, research and development activity and the ultimate adduction of innovations will be adversely affected if one were to preclude a major participant from operating in the market.

Q. Would you be more specific at how research and development in your opinion would be adversely affected? A. Research and development is a gamble just like many other facets of business are. If it is a gamble, you undertake it if you have profit incentives. If this segment of the marketplace will no longer have the incentive in

the form of being able to use these innovations directly, it's only reasonable that they will curtail some of the R and D activities. Second, some of the innovations—some of the R and D work is inspired by realizing what the needs of the consumers are and if you're in direct contact with consumers through company operated stations. I think you get—you get the pulse of the (T. 353) consumer and you may direct your R and D staff to try and deal with these needs in the form of appropriate innovations.

Q. You mentioned adoption of these innovations. How will the adoption be affected by Paragraph C? A. Well, here again I think an innovation by itself is not sufficient because an innovation conceivably could sit on the shelf someplace. We want the innovations to put forth to be implemented, to be adopted and put to use; and I believe that by excluding a segment from the market the adoption of some innovations will be adversely affected; and the reason for it is plain. The frame of reference within which some innovations might be viewed is completely different as viewed by an established dealer who looks at it from the point of view of his local, specific market and as viewed by a marketer, and integrated producer-marketer who is concerned with a large number of stations. That particular firm is maybe more receptive to the risks that is involved in innovation because when you adopt an innovation, by the way, it doesn't mean it's going to be a success. It could be a failure; and then in another words an Edsel. Now who is going to make an experiment with something that could prove an Edsel or a Mustang; and I'm suggesting to you that if you are going to be preclude this segment of the market, we may be paying for it very, very dearly.

(T. 354) Q. Dr. Marcus, based on your study and as an economist do you believe that in the absence of this type

of legislation dealer operated stations will be largely replaced by company operated outlets? A. Not at all. I believe that dealer operated stations and the so-called conventional stations, neighborhoods, have very significant managerial and operational advantages; and I think the fact is that the bulk of service stations that are operated under major brands are indeed operated by independent dealers. These are the facts. The case of Shell, the number ot company operated stations is well under five percent. Now they were free to make these conversions and as Professor Berry very, very clearly demonstrated, they would have done it if it were in their interest. Now it's not in their interest to do it as long as the dealer is performing efficiently and the economics of retailing are such that dealers have a very significant place; so I consequently do not foresee this happening in totality in gasoline retailing.

Q. Are you suggesting that no company will switch from dealer to company operated stations? A. No, I'm not suggesting that either. The marketplace is a dynamic arena. At any one time some firms are going to do well and some firms are going to do poorly. Yesterday we heard testimony from Commonwealth that they are presently (T. 355) operating at a loss. Now this is really competition. It's not a race where everybody ends up in the same place. Now if you start with understanding of the marketplace in these terms, I think it becomes clear that at some point some participant who is doing poorly in this particular area and using this particular mode of operations is going to try and do something else; and he may very well try and move in one direction of another; but this should not be construed to mean that this is where we are all heading. I think it's a kind of ongoing jockeying, if you will, experimentation that a dynamic market must have.

Q. Dr. Marcus, as an economist, do you believe it desirable to protect or shield any segment of the market from competiton? A. Again I think I've answered that implicitly in what I've said. If you're going to offer protection, you are essentially working against the concept of competition. You cannot have competition, that is you don't have economic competitive pressures of participants if they know that they're going to be protected. So I think we've got to accept the notion that under competition there cannot be protection to the participants.

Q. Briefly concentrating on the use of company operated outlets in the gasoline industry, do you know whether or not company operated outlets are also used in other industries (T. 356) that also utilize dealers?

(Mr. Woodstock) Objection, Your Honor. I believe the witness has already testified that there are certain unique qualities about the competition within the retail marketing of petroleum products so I fail to see the relevancy between other areas of competition. He's already designated it as a special area with special qualities.

(Court) Well, he says a certain unique qualifications. He doesn't say it is unique. Unique as I understand it is the pluperfect and permits it no other. He said certain unique qualities. So I'll let him answer.

Q. You may answer the question. A. Actually when I undertook the study, this is one of the things I wanted to see because is this kind of provision going to render gasoline retailing to be entirely unusual in American industrial experience; and I found out a publication that is issued annually by the Department of Commerce of the United States. That publication reports on the major franchising industries. In fact they say they cover all the franchising industries of any consequences; and it then

reports the breakdown between company operated outlets and dealer operated outlets; and it is significant that in each and every one of the industries which are included in this survey, there are company operated stations (T. 357) alongside dealer operated stations.

Q. What is the significance in your opinion of your testimony with respect to the utilization of company operated outlets? A. I think the significance is that there is something about the economics of retailing and it is probably the diversity of conditions in the marketplace in retailing which requires that there be both company operated stations and dealer operated stations; and the proof for that is that each of these industries has in fact resorted to them. If gasoline retailing were to be precluded from it, it would be the only exception among this list of industries covered by the Department of Commerce.

Q. Would you please summarize briefly your opinion with regard to the prohibition of company operated stations set forth in Paragraph C? A. Well, in order not to take time of the court, let me not really summarize but just express my overriding concern here. My concern is that this Act seeks to restructure an industry. I've already pointed out as have the other expert witnesses, Professor Berry and Professor Levitt, the immediate areas of concern, the immediate costs that may be born by the consumers, but I think more broadly a restructuring of an industry has—can have very, very far-reaching consequences (T. 358) because we do not have information that used to be supplied to us by the marketplace; and let me illustrate that that we had a couple decades ago in one way or another frozen the retail structure say of tire distribution, would we have known today the consumers prefer to obtain their tires at department stores, variety

stores, mail order houses, dealers, new car dealers, a whole variety of areas which keep on expanding or shrinking depending upon consumer preferences; and I submit to you that we might not have known because there would not have been any options for the consumer to express his preferences. So my overriding concern is that we might be just doing that. We might be phasing out at enormous potential costs a segment of this industry.

Q. Would you be less opposed to this type of legislation if told that the Legislature can repeal the Act if it doesn't work out? A. Well, in theory that sounds all right and if legislation and social and economic activity could be carried out in a laboratory, I suppose this would be nice to observe and we could then, you know, turn back the experiment and bring the temperature down to the level where we started. I'm afraid that in economic and social organizations realities change and as they change, you may never be able to come back exactly to the point where you started. We've heard testimony (T. 359) here that some participants in the marketplace do intend to discontinue operations if the bill becomes effective. So this will be an economic fact which will have all kinds of consequences on employment, on property. Could we at some point in time restore them? They will have made other plans. We've heard testimony that Gulf has already modified its plans and is not at the moment entering into the market. This is again a consequence so what I'm suggesting here is that on the one side in my view we have the bill which offers no benefits to the public, very, very grave costs may be coming through that bill and consequences that based on accepted economic theory, accepted practices in American industry are entirely undesirable.

(Mr. Abrams) Thank you very much, sir.

CROSS EXAMINATION,

By Mr. Woodstock:

Q. Dr. Marcus, good morning, my name is John Woodstock, representing the State of Maryland.

I believe you said on—you testified on direct that you appeared for the State of Virginia, the Attorney General's office. Was that Attorney General Miller, Andrew Miller? A. I—his assistant is Walter Marston, Jr. and I believe yes, I met Mr. Miller. I was introduced to him.

Q. In what connection or what capacity did you assist him? (T. 360) A. That was on the fair and reasonable rate of return to the Chesapeake and Potomac Telephone Company in the State of Virginia.

Q. Approximately when was that? A. That was I believe in April of this year.

Q. I was sort of interested in your first connection with testifying with regard to the oil industry. I think you said in the fall of '74 you were first contacted by Shell. Is that correct? A. I believe so.

Q. And I believe you said that or maybe you can refresh my memory here. What was the nature of that contact? A. It was sometime September, October, November, December of '74 and I was told that I was going to be subpoenaed to present the statement.

Q. Did they serve you with a summons? A. Yes, there was.

Q. Where was that summons issued from? A. New Brunswick, I believe.

Q. And your deposition was taken, is that correct? A. Yes, sir.

Q. Who was present at that deposition? A. Mr. Abrams, a court stenographer.

Q. Was anyone present from the State of Florida? (T. 361) A. No, sir.

Q. And you were requested at that time to perform a study, is that correct? A. No, sir.

Q. No? A. I said that I subsequently was requested to perform a study.

Q. At what time frame if you can give me some idea? A. Oh, I don't think it was until February that I was really retained and maybe a couple weeks before that I was approached on it.

Q. So your testimony has been a deposition was taken either September, October, November or December and that you were subsequently requested to do a study which commenced perhaps February— A. That is—

Q. So it could have possibly been two months or six weeks after the deposition. A. It could have been.

Q. Did you appear in the Florida case to testify? A. No, sir.

Q. When did Shell retain you for this litigation? A. I believe at about February of '75.

Q. February of '75. (T. 362) A. Yes, sir.

Q. Which was immediately following your deposition in the Florida proceeding, is that correct?

(Mr. Abrams) Objection, Your Honor.

(Court) What's the objection?

(Mr. Abrams) The witness testified that it was not immediately following. It was six weeks to two months after that deposition.

(Mr. Woodstock) All right, I'll rephrase the question.

Q. That was within two months after your deposition in the Florida case? A. Approximately.

Q. And did they retain you as a private consultant for them in this litigation? A. I believe that I was retained as a consultant.

Q. And at a fee, sir? A. Yes, sir.

Q. What's the amount of that fee? A. It's four hundred and fifty dollars a day for an eight hour day.

Q. How many days have you logged in preparation for this case? A. My study to date approximately twenty-five, thirty days.

(T. 363) Q. And that was a study that wasn't introduced, I believe. Is this the study you're speaking about? May I hand you that? A. No, sir, this is not the study that I've done for the—over the year. Is that your question, Mr. Woodstock?

Q. I'm asking you about the study that you were requested to do by Shell. Is that in printed form anywhere? A. No, this is one of the work sheets that I've had and I've had several of them; and this was prepared with a possibility that it might be introduced.

Q Have you prepared any other reports for Shell on the preparation of this trial? A. Mr. Woodstock, this is not a report.

Q. Well, I'm asking if you have prepared any reports for Shell. A. Oh, I'm sorry. I thought you said any other. Any reports? No, I've prepared no reports.

Q. Did you provide them with any statements? A. No, sir.

Q. I believe you testified that in seeking to get more familiar with the gasoline industry for a good many months that as part of your preparation for this case you went down to Houston, is that correct? A. Yes, sir.

(T. 364) Q. Where did you go in Houston, just Shell Oil Company Headquarters? A. We met at the Shell headquarters, yes.

Q. And I believe you said part of that was traveling around Houston and viewing various types of stations? A. Yes, sir.

Q. Was there anything unique about these stations or any other reason why Shell might wanted to have shown you them? A. Yes.

Q. Would you tell me what the unique quality or characteristics of those stations were? A. The stations I had seen I have never seen before anywhere in the country. That doesn't mean that I have travelled throughout the country, but I saw self repair stations and I saw them in operation. I was talking to the supervisor in charge of this and it was quite a very interesting concept where individuals will be coming, renting space in the station and performing their own repairs. I saw equipment designed to allow consumers to replace their oil in the car without their constant attendance. I would have loved to be able to use that in New Jersey. I understand this may be one of the innovations that may or may not work out, but I saw it working in an experimental station. I saw various considerations of (T. 365) self service stations. I saw some of them trying to sell some groceries on the side, film. I really got the feeling of the ongoing attempts on the part of Shell to make it true offering a better product makes better service range to consumers.

Q. Vis a vis, would you characterize that as research and development? Is that a part of Shell? A. This is the laboratory equivalent of research and development that you find in manufacturing companies.

Q. Anything prohibit Shell Oil Company or any other similarly situated major oil company from putting that type of operation or these innovative concepts into existing dealer operated service stations? A. Some of these could undoubtedly be put in dealer operated stations.

Q. Let me ask you about some. How about partial self service? A. Now that I can't answer because the partial self service I don't know the economics of this.

Q. Are you familiar with the market in Maryland of

retail service stations? A. I have studied a great many of the facts.

Q. Does Shell have any partial self service stations in the State of Maryland? (T. 366) A. I'm not certain.

Q. They do. I believe it's also in the pretrial order. Are you familiar with the contents of the pretrial order? A. Your term familiar is—I'm afraid of it. I have reviewed some parts of it. I don't know what familiarity means here.

Q. Do you know the particular facts of your client? A. Facts of—were important but please remember, Mr. Woodstock, that my assignment was not to study the operations of Shell. My assignment was what is my view of that particular Act.

Q. Would it be possible for them to put into conventional service station to make a bay available for a consumer to come in and fix and repair his own car? A. It may not be possible either. May or may not and some of the reasons why it may not be possible is that some of these operations may not be attractive to dealers. Some other innovations that may be coming upstream which are not yet known may not be manageable by dealers for various reasons so my answer to this is some of them could and some of them couldn't. I certainly don't want to see those that couldn't be shut out by these service stations.

Q. You say it may not be attractive to a particular dealer, is that correct? Isn't that what you said? (T. 367) A. May not be.

Q. Well, whose decision should it be whether or not it goes into that particular location if that individual dealer who finds it unattractive has been at that location and is there under an existing lease agreement? A. I'm afraid the question is not very clear to me.

Q. It's very simple. Should Shell have the final decision to implement that innovation at that station or should the independent businessman who is operating it? A. Depending upon what innovation and what are the terms. I think an innovation is a broad term. It goes all the way from a new jet engine, a new aircraft to something that the stores have described as the brakes.

Q. Sir, I have given you a very specific exxample and I'm talking about opening an existing bay with equipment and tools there for a consumer to fix or repair his own car or to provide a area in there to unscrew his own nut and change his own oil. A. And what is your question?

Q. Who should have the final decision as to whether or not that new innovation should be implemented in a Shell leased dealer service station? A. Mr. Woodstock, to the best of my knowledge dealers are free right now to set aside a bay to tun—to cons mers and (T. 368) the reason they probably don't want to do it is that they can make much more money by performing the services in their own way.

Q. So the consideration as to whether or not it's particularly attractive to any dealer doesn't really mean anything? A. It's his decision then. Some of these innovations could be adopted by dealers with no problem at all. They're on the market.

Q. How about a gas only station? A. What about it?

Q. Could in your expert opinion— A. What is your question? I'm sorry, I don't—

Q. In your opinion could that be operated by a dealer lessee as opposed to direct company operation? A. If it is economically desirable for him to operate, but a dealer—but a gas only operation as I've heard here from president of Kayo and as I've heard from yesterday from

PMC they maintain—these are the people who run these operations. These are the people who sweat it out and they maintain that they can't do it with dealers.

Q. Again I ask you your familiarity with the Maryland market. Are you familiar with a company such as Crown Central Petroleum in Maryland? (T. 369) A. I'm aware of their existence in the Maryland market.

Q. Are you familiar with their percentage of sales over the last five years in the State of Maryland? A. Yes.

Q. What does that reflect to you, sir? A. It reflects to me that the marketplace is big enough, yet diverse enough to allow some operators to do it one way and some other operators to do it in another way. It's the only conclusion that I would draw from that.

Q. You're familiar with Hess Oil Company, too? A. Yes.

Q. Are you familiar with their operations in Maryland? A. I believe so. I have an idea.

Q. Do they operate through dealers? A. Well, there was a legal squabble the other day when this question was raised and if I'm—one thing I'm not is a lawyer and somebody said that the underlying terms they are very—I heard all kinds of terms like commission agent, but let me try to answer it as an economist. Here again what you're doing here is you're selecting participants when you say hey, he's operating this way. Can't everybody operate this way? If everybody tried to operate this way, then he couldn't and the only reason one person can do it this way is the others are doing it in a different way. This is the essence of the (T. 370) diversity in the marketplace.

* * *

(T. 375) Q. Dr. Marcus, as an expert, what advantages do you see to direct owned, company owned and operated station by the major oil companies upon price

competition in the State of Maryland? A. Here I don't—this is one area where I do not believe that there are considerable advantages, that is, if you talk about direct owned by the major brands; and the reasons for this have been stated in my testimony in Jersey. I believe that the major oil companies are not going to use (T. 376) their company operated stations in a cut-throat competition with established dealers and consequently I do not believe that the thrusts of price competition to company operated stations will take place from the major owned, company operated stations, but I think the producer-refiner category includes other participants, very important participants which have been identified for this court and they are a very important factor in price competition.

Q. To what extent have you examined all the actors in the universe, if you will, of mar—petroleum marketing to distinguish various characteristics about their price marketing activities? A. I have done my best to become sufficiently familiar with the groups and categories of participants to form the opinion which I've just expressed.

Q. Do you find there are different sub-classes amongst the producer-refiner category as to their competitive behavior on price? A. I—even I was able to observe that Hess station traditionally sells under the major brands. Crown sells under the major brand. They are producer-refiners. There is no question that you're dealing here with different types of retailers. The Crown, the Scots, the Kayo have made it clear that they do not try and compete over the (T. 377) entire range of services. It would be suicidal for them to do so; so why would they mention the competition that they choose to emphasize or may be forced to emphasis under market conditions is price.

Q. Are you familiar with any non-producing refiners independent retail service stations dealers in the State of Maryland or in the State of New Jersey or in your travels around the United States? A. They're all listed in the pretrial order and I–

Q. Are you particularly familiar with them? A. I have seen them, yes.

Q. How about are you familiar with their pricing pattern? A. Again I think it is clear that they constitute an important factor in pricing competition.

Q. Are you familiar with their pricing patterns, sir? A. I am familiar with the fact that they are a competitive force in the gasoline retailing. Pattern is a term which–do you mean a historical product pattern, a regional pattern. I'm a little bit uncomfortable with it.

Q. We'll start with an historical pricing pattern. A. Well, again as an economist it is very, very clear that these marketers had to continuously compete in the marketplace. They had to emphasize another dimension, perhaps (T. 378) they had to emphasize price more because they weren't giving other services. The point of the matter is that in the marketplace there was a segment for them and they had some bad years I understand and some good years.

Q. You see a difference between the way they marketed and emphasis on price as opposed to perhaps other qualities of marketing demonstrated by the major integrated oil companies? Historically? A. I'm afraid I've not studied the broad question which groups all marketers in one category and relates to the entire history and ask me to summarize the entire history. There have been various periods, various regions, various marketers. I'm just unable to answer the question the way it has been posed.

Q. You were here yesterday Dr. Levitt, I believe,

testified to a wheel of retailing concept. Are you familiar with that concept? A. I'm familiar with the concept. I haven't quite seen the wheel but–

Q. Are you familiar with it as it pertains to the petroleum industry? A. I think the concept again is universal as Professor Levitt pointed out. It is the motion that the wheel turns. By the way I would have added to it the wheel sometimes turns (T. 379) forward and then may turn backwards. It's not always a continuous motion in one direction. I think what he was trying to say is that there are great dynamic changes and look, the best illustration for that is is that in the 1930's the oil companies were virtually, entirely operating through company owned stations; and now we're talking about a situation where the major brands are operating almost entirely and predominantly through dealer operated stations. There was no government statutes which lead them to do it directly, which caused them to diverse themselves, but there are plenty of opportunities to go back to that. I think one has to approach the marketplace with a great deal of respect for the uncertainty, for the dynamic conditions and I'm frightened to have the law just freeze a segment of it.

Q. Doctor, in your opinion does vertical integration increase the number of competitors in the market? A. Question–Mr. Woodstock, I don't have enough information to answer you.

Q. Generally speaking in the petroleum industry where you have witnessed and examined vertical integration, has that resulted in increased numbers of competitors in the marketplace?

* * *

(T. 381) Q. Confining yourself to the State of Maryland and as a result of your studies of the Maryland market, has forward vertical integration resulted in an

increase in the number of competitors in the marketplace selling gasoline to the consumer, public? A. Mr. Woodstock, if we have a situation, we have one oil company selling to an independent dealer and you now tell me that this particular consideration has changed, that the major oil company has—is now directly operating a retail firm—the retail end of it, under this configuration you previously had two units, you now have one and I don't think this by itself has any bearing to competition in the marketplace.

Q. Sir, I think you've repeatedly testified this morning one of the essential elements to healthy competition is the diversity of that marketplace and an ingredient of that is the number of competitors. A. That's correct.

Q. Now I still don't believe I have received an answer to my previous question. A. I really—

Q. Unless you're saying that two into one means a reduction.

* * *

(T. 382) A. Well, yes, if you had two before, this is the universe, this is the reality, no other consideration into account and the two merge into one, we have one.

Q. Does it help the general concept of competition to (T. 383) have a large or a small number of price decision makers in that marketplace? In the sense that that price decision maker relates to making an offering to the consumer? A. I think it's very important to have a good number of participants, but I think it would be erroneous to assume that every time you add one you make a market more competitive and any time you remove one you necessarily make it more competitive. I think it's not a continuous kind of change. So my answer to your question is yes, we need a good number of competitors but it does not follow that any time you remove one you have necessarily adversely affected competition. If you

had only two competitors and you removed one, you've got an monopolist. If you had two hundred and you removed one or two or three or five, may be entirely different, but it also depends who you are removing, you're removing a particular type and again you have exerted influence on competition. So I'm afraid it's a most complex question.

Q. Doctor, I believe toward the end of your testimony you said that something to the effect that your main concern over this bill's effect would be that we haven't had enough time and opportunity to find out or study and find out what we would be doing and it's a fear of what might happen. I may be restating that wrong, maybe you can restate for me. A. No, I'm sorry it's not correct.

(T. 384) Q. Okay, please restate what you said. A. It is not a correct understanding of what I tried to say. I first of all have emphasized very specifically the areas in which I believe consumers would be adversely affected and I've listed a good number of them. I then pointed out that in addition to that, quite apart from that, the restructuring of an industry has—is an extremely risky undesirable and this is a conclusion that we draw from looking at the history of retail activity and the court heard examples about changes in super—from grocery stores to supermarkets, the evolution small apparel shops into department stores and discount stores and the like. What I'm suggesting to you that if somebody in the 1920's had tried to say to the little grocery people, hey, we've got a beautiful, brand new supermarket, who needs it, what we going to do for us. If we had adopted this particular strategy, the costs would have been enormous; and I thoroughly suggested, further suggested that we are not doing it in other areas of the economy and I see no reason for doing it in gasoline retailing.

Q. So the danger is that the bill attempts to restructure an industry? A. This exclusion of a segment of an industry amounts to restructuring its nature and characteristics, yes, sir.

Q. To the best of your knowledge, has the—any of the (T. 385) large segment of the petroleum industry ever been restructured by governmental action? A. Restructured in terms of prohibiting entry of a particular segment, prohibiting operations in a particular area, prohibiting a mode of corporations, to the best of my knowledge, I'm not familiar with any, no, sir.

Q. How about the divestment of various segments of that industry? A. I think divestments—well, first would you please tell me in what—

Q. Divestment of—are you familiar with any governmental actions historically which required the divestment of certain portions of the oil industry in this nation? A. As I understand divestment, in cases where I've seen it effectuated, it is a remedy that the law has, very specific—under very specific circumstances where it is called for, where there has been determination that the particular firm and I'm talking here of the distinction between a firm and restructuring an industry, so where a particular firm has engaged in some form of violation of anti-trust laws or FTC laws, I believe this is a remedy that the law has.

Q. That's the test of your knowledge as far as regarding the concept of divestment. Are you aware of any (T. 386) other legislation which calls for divestment or called for a divestment of particular aspects of any industry in this country without finding specifically they were violating the antitrust law of the United States? A. I'm aware of one. The New Jersey bill, which, of course, was not acted upon after the hearings, but I would not

presume to be aware of any—all bills of legis—of any legislature or Congress seeking particular remedy or particular proposals, I couldn't conceivably know of all of them.

Q. As an economist and I believe you testified as to—you're an economist and also you have a relationship with industrial organization, would you give me a little bit of background on that again. I have some notes here but they're not that good. A. Well, I would like to believe that my expertise is in the area of industrial organization which is the study of the relationship between the structure of industry and its behavior in the marketplace and its ultimate effect on consumers.

Q. Wouldn't you consider part of your required knowledge to make an economic evaluation and advise an industrial organization an awareness of whether or not certain economic conduct could even be undertaken? A. I'm not an evangelist going around offering advice (T. 387) to any particular, unspecified action. I don't understand the thrust of it. What—where have I been asked to do what which I have refused to do?

Q. As an economist, can you conceive of any situation where legislatively imposed divestiture of an industry would be appropriate? A. Mr. Woodstock, a legislature may have all kind of reasons, may sometimes be right and in my humble opinion sometimes it is not right—

Q. I'm asking you for your viewpoint as an economist, not a legislature, I don't believe you've been elected. A. No, as an economist I also have an opinion about—now the complexity of economic situations is so enormous that to ask me is there any situation under the sun under which this might be necessary is really a task that I can't handle. I mean it—if you care to specify a set of circumstances, I would do my best to answer it.

(Mr. Woodstock) I have no further questions of this witness, Your Honor.

(Mr. Abrams) I have no questions, Your Honor.

* * *

(T. 396) CHARLES J. LUELLEN

a witness of lawful age after being duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Drogula:

Q. Will you please state your full name, sir? A. My name is Charles J. Luellen.

Q. What is your current position with Ashland Oil? A. I am a group vice president of Ashland Petroleum Company, division of Ashland Oil Inc.

(Court) Excuse me, sir, how do you spell your last name? A. L U E L L E N.

(Court) Thank you, sir.

Q. What are the duties of your present position, Mr. Luellen? A. I have responsibility for all sales of gasoline made by Ashland Petroleum Company, most of the distillate fuel (T. 397) oil sales and all of the asphalt sales for the company.

Q. And how long have you held that position? A. A little over three years.

Q. Prior to that period of service, would you please give us a brief outline of the other positions you have held with Ashland? A. Yes, I began working with Ashland in 1952 beginning in a training program which involved work in the refinery, in terminals, in service stations, in sales offices; and between 1953 and 1959 I served as a sales representative in several sales territories. 1960 I was transferred to a subsidiary company, Louisville Refining

Company, as a sales representative and I left that company in 1967 as vice president of sales and distribution. 1967 I moved to company headquarters in Ashland, Kentucky where I served for about three years as an assistant to our board chairman. In 1970 I became vice president of branded marketing where I served until I assumed my present duties.

Q. Do you belong to any organizations within the petroleum industry? A. Yes, sir, I'm a member of the American Petroleum Institute and I'm currently serving on two committees. I'm the director of the Asphalt Institute and have been involved in several committee assignments there.

(T. 398) Q. Will you please give to the court a brief description of Ashland Oil as a company? A. Well, it's a diversified concern with operations in all phases of the petroleum business. In addition we have a highway construction division, a division that produces and sells coal, and a division that manufactures and sells various chemicals.

Q. Focusing your attention on the petroleum activities, is that handled by a specific subsidiary or division? A. Yes, Ashland Petroleum Company.

Q. And would you please give us a little more specific information as to the petroleum activities within that company? A. Well, as you stated, we operate seven refineries, two in Kentucky, two in Ohio, one in New York, one in Pennsylvania and one in Minnesota. We run approximately three hundred eighty-five thousand barrels per day of crude oil, that's the capacity of those refineries. On crude oil, that, as you've mentioned, is purchased largely from other producers. We are involved in all phases of transportation, both crude oil and finished products; and we sell our products at wholesale, at retail, the entire range.

Q. Focusing on your refinery operations, how many barrels or throughput which you mentioned, three hundred and (T. 399) eight-five thousand barrels a day, was attributable to crude oil which Ashland owns or controls? A. About fifty thousand barrels per day, which is our worldwide production.

Q. Would you explain to the court how Ashland goes about obtaining the additional crude oil it requires? A. Well, we must buy it in the open market at the prevailing prices; and we do so from a variety of sources including major oil companies, independent domestic producers, foreign national oil companies, so we cover all phases.

Q. It it correct to characterize Ashland Oil as an independent refiner? A. Yes, sir.

Q. Would you please indicate how that term is used in the petroleum industry and what it refers to? A. Well, it's widely taken to mean a refiner who controls less than thirty percent or who owns less than thirty percent of the crude oil he runs through his refineries. In our case it's about fifteen percent or slightly less. It's also taken to mean or it has as varying form the method of gasoline marketing. In that sense we also are independent oil company and that we rely largely upon independent private brand marketers, both our customers and our own direct operated stations for the sale of our gasoline.

(T. 400) Q. Does Ashland's crude deficiency cause in any operational problems in the area of supply or the area of price? A. Yes, sir, we have to operate, of course, at a crude oil cost disadvantage compared to many of our competitors; and so it's always been a handicap, however, it's one that we are able to live with and prosper through most of our history and became a very serious problem, of course, during the shortage and subsequent rapid increase in crude oil prices.

Q. I'd like to focus your attention on the period which you referred to as a period of shortage. Approximately what period of time did that cover? A. Well, it began in 1972 and continued on through early 1974.

Q. Did the absence of crude oil affect the runs at your seven refineries? A. Yes, it did. They were sharply reduced particularly during the embargo period which was October 1973 until March '74.

Q. Mr. Luellen, I'd like to nand you a document and ask you if you can tell us briefly what it is.

(Mr. Drogula) Your Honor, may I hand a copy to the court?

(Court) Yes, sir.

A. Yes, sir, this is a graph showing our refinery runs beginning in October 1973 through July 1975.

(T. 401) (Mr. Woodstock) Your Honor, I'd like to object to it and question the relevancy of his testimony with regards to the statute being challenged in this litigation.

(Mr. Drogula) I would be happy to respond to that, Your Honor.

(Court) Go ahead and you can tie it in.

(Mr. Drogula) We have heard Mr. Woodstock examine the expert witnesses and certain of the company witnesses at length on the question of vertical integration; and I believe that this document bears directly upon showing that Ashland is not a fully integrated, major oil company. Not only that the fact that it is crude deficient costs is more in the role of an independent gasoline marketer as I believe you will see when we get into the State's own case. I think the fact that Ashland itself was injured during the crisis indicates that it was one of the members of the class to be protected rather than among the members of the class to be legislated against. This

chart dramatizes how vulnerable Ashland is to the world crude oil supply.

(Mr. Woodstock) May I respond?

(Court) Yes.

(Mr. Woodstock) Doesn't appear to me that our statute in any way affects the crude supply of any company. Secondly the basic facts of Ashland's operations have already (T. 402) been stipulated to and a part of the record as part of the pretrial order; and this extensive affidavit from an FEA official which also discusses this aspect of the petroleum industry.

(Court) Well, I think counsel is trying to indicate to the court at least as we know that if it can be shown that a particular class of citizens or organizations or any particular class may be particularly segregated; and all members of that class treated equally, then laws applying to that class do not necessarily have to be deficient on the question of due process. Now as I understand the thrust of Ashland, it's attempting to show that it does not necessarily belong in the class of a major refinery and it shouldn't be included in this—in the prohibitions of this Act; and I think they can do that.

(Mr. Woodstock) Your Honor, if I may make one last point that the bill in question does not use a classification of major or minor producers or refiners. The classification is very broad in that sense and all encompassing; and when they filed their Bill of Complaint for the purposes of standing, they said we are a producer-refiner; and I assume the facts I believe as to whether or not they are affected by the bill within the classification is obvious on the face of the pleadings.

(T. 403) (Mr. Drogula) I believe, Your Honor, an issue in this case is the rationality of the classification. If a state legislature in the exercise of its police power drags

its not too broadly and includes within the class individuals or companies who do not reasonably belong there upon any rational set of economic facts, then the classification is arbitrary and must fall. As the court anticipates, we do seek to indicate to the court that this statute makes utterly no economic sense as to independent oil companies because without the crude production they lack the capacity or the potential to injure any other class in the petroleum industry.

(Court) Overrule the objection.

Q. Mr. Luellen, directing your attention to the document which I just handed you, would you please interpret for us the apparent decline which appears in the latter part of 1973? A. Yes, as a direct result of the continuation of the effects of the shrinking availability of domestic and foreign crude which occurred prior to the embargo and then the very drastic reduction which followed the embargo, which as I said began in October and ended the following March.

Q. What was—what were the consequences of that decline in crude oil supply upon the company? A. Well, it was very drastic because our refining business is one which relies very heavily upon incremental (T. 404) barrels where there is one operating its plant at maximum output; and so immediately we had to reduce refinery runs which reduced to the most profitable barrels available to us.

Q. What impact did reducing your refinery runs have upon your retailing operations? A. Of course, it had the effect of reducing them.

Q. Was that the case with respect to both branded and unbranded marketing? A. Yes, sir, it was.

Q. Mr. Luellen, does Ashland engage in the sale of branded gasoline? A. Yes, we do in a very small area

adjacent to our principal refinery at Catlettsburg near Ashland, Kentucky. We market as a conventional branded seller in a small portion of southern West Virginia, eastern and central Kentucky and extreme southern Ohio. The total sales of gasoline through those outlets account for about only eight percent of our total gasoline sales.

Q. Are those stations in those areas which Ashland markets through branded outlets dealer or company owned outlets? A. They are dealer operated outlets almost without exception. Fewer than six are company operated.

Q. Why does Ashland confine its sales of branded gasoline to the areas which you have just mentioned? (T. 405) A. Briefly because that kind of marketing is totally dependent upon brand image or brand recognition. Involved in brand recognition is great expense and years of effort, much advertising must be done, a great market penetration must occur, that is, there must be many stations so that the consumer is frequently exposed, a credit card system which is an extremely expensive to operate and must be developed and administered; and we simply have not had the resources over the years to develop that kind of system and then operate it profitably.

Q. Has Ashland attempted to market branded gasoline outside the geographical areas you have just mentioned? A. Yes, we have. We planned to enter markets adjacent to the three-state area that I just described and did so. For example; after we had established some branded outlets, business in Pennsylvania, in central and northern Ohio, we next tried to develop that kind of business in Michigan and we began that effort in about 1957. 1953, excuse me; and for seventeen years we stayed with that effort. We did not have very much money to spend on it, but yet we spent well over a million dollars and in 1970

we concluded that we absolutely could not earn a return on our investment and so we withdrew from that effort entirely. During that entire time we never had as much as one quarter of one percent of the total Michigan gasoline market running through our branded (T. 406) service stations so we not only and we lost money as it relates to that, something over a half million dollars during that period of time from operational losses. In addition to that, of course, we were deprived the use of that over one million dollars in capital which could have been applied to a more efficient, economical mode of operation.

Q. As a result of that, Mr. Luellen, how does Ashland market gasoline in parts of the country which are beyond its home territory? A. We sell gasoline at retail to our company owned, company operated stations which are identified by the names other than Ashland and whose style of operation is that that emphasizes low price, limited services, no TBA operations, no service bays, no dealers, we operate them direct.

Q. What is it about unbranded marketing that makes it easier for companies such as Ashland to penetrate distant markets? A. Well, it's a type of marketing that can be—a type of market that can be entered easily because it isn't necessary to have the credit cards, the advertising and the brand acceptance. The appeal to the consumer is obvious, its price and limited fast service and so it's easy to enter.

Q. You mentioned that Ashland operates in distant markets through company operated stations, is that a uniform policy (T. 407) A. Yes, it is.

Q. What are the reasons that Ashland chooses to operate those unbranded marketing facilities as company operated stations? A. We must have control of the basic elements of the operation. The basic elements are quite simple and they are price, appearance, housekeeping and

hours of operation. We cannot do that by operating on any basis other than direct.

Q. Mr. Luellen, does the existence of company operated stations have anything to do with the success or failure of your refining operations? A. Yes, sir, it does. We sell approximately sixty percent of our gasoline to wholesale customers who typically are resellers who own their own stations, resell the gasoline they purchase from us through their own stations. These people are totally independent of us. We have enjoyed their business for many years, however, they have no obligation to us to continue buying from us. We have no investment in their business. We have no contracts with them and there's no written contracts with them; and so those people can leave us at any time and frequently over the years they have left us for various reasons but most frequently to avail themselves of lower price and so in order to expand our refineries we found it necessary to ensure ourselves of a certain nucleus (T. 408) of controlled business such as we achieved with our direct salary operated stations. So in order to assure ourselves of continued high optimum refinery runs, we must have that nucleus of direct controlled business.

Q. Were those policies borne out during the recent fuels crisis? A. Yes, sir, they were.

Q. Would you explain how the presence of company owned stations assisted Ashland during that period of time? A. Well, after the rapid escalation of crude oil costs when our costs rose from roughly three and a half to eleven and a half, twelve dollars per barrel, of course, our gasoline prices had to be increased radically also; and so our independent customers whom we have no tie on as I mentioned were free to leave as for other suppliers and frequently did.

Q. What would have been the consequence at that

time had not Ashland had these company operated stations? A. The consequence certainly could have been, undoubtedly would have been that we would have had to make the decision to reduce refinery runs.

Q. What would that have done to the economics of your refinery operations? A. Would have been very damaging, of course.

Q. Mr. Luellen, in the presence of company operated stations (T. 409) relevant to the fact that Ashland is an independent, crude deficient refiner? In other words do the operation of company stations assist you because of your status in the industry? A. Yes, definitely.

Q. Would you explain to the court how that—

(Mr. Woodstock) Objection, Your Honor. I don't think the witness is qualified to speak for every other independent refiner who may or may not have retail service stations; and I have no idea what the universe is in that category. I don't believe there's any testimony to that effect on the record; and I—if counsel would rephrase the question limiting it to just Ashland.

(Court) All right, rephrase the question.

Q. Mr. Luellen, in what way is the presence of the company operated stations of value to Ashland given the fact that it is a crude deficient, independent refiner? A. It gives us protection against loss of uncontrolled business and thereby enables us to maintain our refinery runs at maximum levels.

Q. Directing your attention, Mr. Luellen, in the period of time encompassed by the so-called fuels crisis, did Ashland experience significantly higher crude acquisition costs than major integrated refiners? (T. 410) A. Yes, sir, we did.

Q. I'd like to hand you a document, Mr. Luellen, and ask you if you can tell us what it is. A. This is another graph showing the average crude oil costs of Ashland by

the month beginning in March 1973 continuing through December 1974 on one line and the other line shows the crude oil costs of major integrated refiners. The source of data of the other companies, incidentally, is the Federal Energy Administration.

Q. Mr. Luellen, what is the significance of the fact competitively to Ashland that during that period of time it experienced a crude cost disadvantage in the area of two to three dollars per barrel? A. Well, the penalty, of course, resulted in the fact that we had to attempt to get our prices up, our refined product prices up sufficiently to pass through that—those cost increases.

Q. Now, Mr. Luellen, do company operated stations permit Ashland to offset in part these disadvantages of crude acquisition? A. Yes, sir, by protecting us from loss of substantial volumes of uncontrolled business.

Q. Turning your—directing your attention, Mr. Luellen, to Ashland's operations in the State of Maryland, can you tell (T. 411) us when Ashland first entered the unbranded market in Maryland? A. Yes, it was in 1961.

Q. Can you tell us whether Ashland has ever had a lessee dealer operating in the State of Maryland? A. No, we have not.

Q. At the present time how many stations does Ashland operate in Maryland? A. There are seventeen.

Q. Would you again very briefly since you've already touched on this tell us what these stations look like and their marketing strategy and how they operate? A. Yes, they're typical of other price marketers, I believe. They typically are stations located on parcels of ground usually not at intersections as is the case of branded operations. The buildings are small, they include a shelter area for attendants and a small storage area. There are no services offered. No service bays are present or in the case of two

stations which were acquired from other companies where there were bays, they are boarded up. Price is the principal appeal to the consumers. The other appeals are long operating hours, typically they operate eighteen hours a day, none less than eighteen hours a day, three hundred sixty-five days a year. Some of them are twenty-four hours per day operations. Fast service, low price, constant hours of oper—long hours of (T. 412) operation.

Q. Will you tell us something about the pricing policies of these stations in relation to major branded marketers? A. Well, major branded marketers really we feel are not our competition. Our competition is from others who market similarly. Price is all important and our price must be lower as must prices of others who market similarly than is the price of major brand dealers who offer full service, credit cards, tour service, the entire package associated with that kind of operation.

Q. Does Ashland have a policy as to how many pennies below the major brands it attempts to price? A. No, we have no policy.

Q. As a matter of practice in the State of Maryland, approximately how much lower in price have these Ashland stations been? A. Approximately three cents.

Q. Three cents a gallon. Mr. Luellen, I'd like to hand you photographs of four of Ashland's stations in the State of Maryland bearing the brands that you have described and ask you if these are typical of the stations which Ashland operates in the State of Maryland? A. Yes, sir, they are.

Q. None of these stations, am I correct, offer service (T. 413) or has service bays or other facilities? A. That's right, none of them does.

Q. Mr. Luellen, are you familiar with Chapter 854, the legislation which we are concerned with— A. Yes.

Q. –in this litigation? A. Yes, I am.

Q. Are you familiar with what that Act would import for Ashland and seventeen stations in Maryland? A. Yes.

Q. Has Ashland considered what alternatives it might follow in the event that this statute should become effective? A. Yes, we had to consider alternatives, of course.

Q. What are the alternatives as you see them? A. Well, the first thought is that we would attempt to place this gasoline through retail outlets in some other state. The second–that of course would involve disposition of the stations which would be unfortunate at best and undoubtedly difficult because their best use, we feel, is their present use. Another alternative, of course, would be to consider dealer operation, which we have done, and we know that we would not choose that route if there were any other alternative open to us.

Q. Let me stop you there for a moment. Why is it (T. 414) Ashland's view that they would not operate the seventeen stations through lessee dealer? A. Because we simply could not control the vital elements, those being price, hours of operation and appearance standards.

Q. Is this decision based upon any experience within the company? A. Yes, sir, it is.

Q. Would you please explain that, please? A. Well, we have had dealer operations both in our branded operations and in a few of our private brand operations; and we simply–we have learned through very hard experience that we simply cannot control these vital items.

(Court) Mr. Drogula, do you want to enter these photographs into evidence?

(Mr. Drogula) Yes, sir. Would Your Honor prefer that I offer them at this time?

(Court) All right.

(Mr. Drogula) I would do so.

(Photographs filed herewith as evidence as Plaintiffs' Exhibit #12A through 12D)

Q. Mr. Luellen, does Ashland engage in the sale of gasoline in the State of Maryland at wholesale? A. Yes, we do.

(T. 415) Q. Would you please describe those activities? A. We sell to customers who typically operate their own service stations under their own brand names and those customers are also price marketers. Some of those customers have both direct operated, salary operated stations and dealer operated stations. The customers cover a wide range of size, economic size, from small individually operated businesses on through multi-station, private brand chain operators and even includes such giant companies as Sears Roebuck, Penneys, Food Fair who by our gasoline, resell it directly through salary operated stations located at their stores.

Q. If Ashland were obliged as a result of the legislation involved in this litigation to withdraw from retail activity in Maryland, would that have an effect upon Ashland's wholesale activities? A. Yes, sir, it could. It would jeopardize our position. We have found that we can expand as we did into the Maryland market in 1961 only if we can achieve a balance of uncontrolled and direct retail business which is controlled; and so the losses at retail business would obviously reduce our total throughput in barrel, our total marketing in Maryland.

Q. Is any of the gasoline which Ashland sells in Maryland Ashland's own gasoline? A. No, sir, it is not.

(T. 416) Q. Would you please indicate how Ashland acquires the gasoline which it sells in Maryland? A. We acquire it by exchange.

Q. With whom do you exchange? A. Continental.

Q. Continental. Now would the inability to operate

retail stations as company owned facilities jeopardize Ashland's ability at wholesale to enter into such exchange? A. Yes, it could where the exchanges must be–the exchange volumes must be in balance, of course, They are in balance now. They are in balance because we have the total requirement that consists of both retail and wholesale business. If we're deprived of either segment of our business, then the exchange will be out of balance and it could be unbearable.

Q. Mr. Luellen, would you please indicate to the court who you consider your competitors to be in the State of Maryland? A. Our competitors at retail are other price marketers and they include the many different kinds of marketers that I touched on briefly in the description of our wholesale business.

Q. If Ashland withdrew from the State of Maryland as a result of this legislation, would it have the capacity to reenter the state at a future time without undue expense or burden to the company? A. Well, certainly it would be very expensive and (T. 417) very inconvenient and additionally very disruptive to our total operation; and I really can't say, of course, definitely but it would be very difficult.

(Mr. Drogula) I have no further questions, Your Honor.

* * *

(T. 417) (Mr. Drogula) Your Honor, before the cross examination proceeds, may I offer into evidence documents previously marked as exhibit 13A and 13B?

(Court) All right, sir.

(Graphs filed herewith as evidence as Plaintiffs' Exhibit #13A (T. 418) and 13B).

CROSS EXAMINATION

By Mr. Woodstock:

* * *

(T. 420) Q. From your understanding of the Maryland Act, does it in any way affect Ashland's crude oil supply situation? A. No, not directly, It does affect potentially very severely our total refining operations, however.

Q. I ask you about your crude oil supply situation. A. Yes, sir and I answered.

(T. 421) Q. Availability– A. And I answered no.

Q. So the fact whether the Maryland law stands or falls is not in any way going to change or alter your crude oil situation? A. That's right.

Q. And until the crude oil situation changes, how can your refining situation possibly change? Is there any way it could possibly increase if you don't get more crude oil?

* * *

(T. 421) A. We can increase our refining runs and we hope to do so. To do so, of course, we'll have to acquire crude oil at very high cost. It will be impossible to do so based on our previous experience unless we are free to operate our sales in the manner we always have operated which includes sales both (T. 422) at wholesale and at retail.

Q. Have you ever tried to get rid of your entire refined products to the wholesale market? A. Ah, no, we have not.

Q. Have you ever investigated the possibilities of potential buyers in that market to buy up your full production of refined product? A. We've never wanted to find a buyer for our total production. We find much more appeal in selling to numerous wholesale customers and then balancing those sales with retail.

* * *

(T. 422) Q. You testified as to Ashland's experience in trying to operate branded dealer lessee stations in Michigan. I believe you stated that was initiated in 1957, is that correct? A. I said that first and then I corrected myself, I think it was in 1953 that it began. I'm certain it was because we ended that effort in 1970, seventeen years later.

Q. I'm sorry. A. Seventeen years later we ended it so it was 1953 to 1970.

Q. I believe you also said you had an investment of a million dollars, initial investment. (T. 423) A. Over a million dollars, yes.

Q. How much over a million dollars? Two million? A. No, slightly less than a million one.

Q. How many stations did you try to crack the Michigan market with? A. Oh, I think—I'm sorry, I don't have the record with me. I would say that perhaps thirty-five at maximum.

Q. You had thirty-five stations built and— A. Built or acquired.

Q. Their cost of a million point one? A. Pardon?

Q. For a cost of a million dollars you had that— A. We did not build them all, Mr. Woodstock, we acquired some by lease from their owners.

Q. How did Ashland's station representation in numbers now compare with the stations of the other major competing brands in number at that— A. Well, in the total state, of course, we were in—we were not a significant factor. In certain areas, certain towns in Michigan, we had enough stations. We thought we had acquired enough stations to give us a fair chance at surviving.

Q. Do you have any idea of the total number of service stations in the State of Michigan at that time? A. No, sir.

(T. 424) Q. Not even a ball park figure? A. No.

Q. Do you think that thirty-five stations into the entire State of Michigan would enable you to ever possibly gain more than one percent of the total Michigan market? A. Certainly not, but within individual communities where we had two, three or four stations as we had, for example, the Ypsilanti area, then we certainly felt that we did have a fair chance to compete effectively.

Q. You testified on direct— A. Had we succeeded in Ypsilanti, for example, we would have been encouraged to go to the next town and the next and the next, which is the way we build a relatively successful branded operation in the eastern Kentucky and that area.

Q. You never considered going to the major metropolitan area in Michigan like Detroit? A. No, sir, although Ypsilanti, of course, is on the fringe of it.

Q. You did testify on direct that you never got more than one percent of the Michigan business, is that correct? A. No, we had something less than one quarter of one percent.

Q. Well, when you went into it with a commitment of slightly over one million dollars and the number of thirty-five (T. 425) stations, did you ever anticipate that you would acquire more than one percent of the Michigan business? A. Certainly, certainly we had hopes.

Q. In what time frame, sir? A. Well, it was a long time ago, Mr. Woodstock, and I can't tell you. I would say if I were facing that decision today, I would hope to be able to do it within five to ten years. I would think that there would be no way I could justify recommending that kind of investment unless it could be done in that period of time so I believe we felt that we gave it a very fair trial.

Q. And five year period would probably be sufficient to give you an idea as to whether or not you could make it in the market retailing that way? A. I would hope so, yes.

Q. That would be true for anybody who was in your situation and wanted to try doing that and– A. Well, I can't speak for others, of course.

Q. Are you familiar with the wholesale accounts that you provide products to in the State of Maryland? A. In general, yes.

Q. Any of these contracts or supply agreements cancelled during the '73 through '74 period? A. Well, we have no written contracts. During 1972 when (T. 426) it became apparent that crude oil supply was going to be short, we notified all of our customers that we would put them on a allocation program which we voluntarily administered and we notify them also that if they chose to leave us, it appeared to us that supply was going to be a very severe problem and that if they chose to leave us and not avail themselves of this base allocation that we voluntarily established for them, this was prior to FEA's advent, then that if they wished to come back at a later time we possibly would not be able to supply them.

Q. Did that in fact–was that borne out? A. Yes.

Q. And certain people stopped being supplied by you? A. Yes.

Q. Did you continue to supply your own stations? A. Yes.

* * *

(T. 428) Q. How many of those wholesalers in Maryland had ceased to receive supply and be supplied by Ashland during this period of '73, '74, the ones you stopped supplying actually operated independent service stations? A. All of them.

(T. 429) Q. All of them.? A. Yes, all of them we stopped, stopped voluntarily, Mr. Woodstock.

Q. Well, if they didn't have any product, I guess they had to close the door. A. They stopped buying from us

because they could acquire the product at a lower price from another supplier.

Q. Do you know for a fact from whom they acquired it? A. No, I don't.

Q. Do you know for a fact that they did acquire it? A. Yes, I do.

Q. Do you for a fact know the price? A. No, sir, I have access to those records. I don't have them with me.

Q. Where would you acquire records of somebody else's price? A. Well, we would have no proof, of course, unless we saw an invoice which our salesmen occasionally do. It's a part of their duties, of course, to try to find what competitive prices are.

* * *

(T. 434) Q. Is the gasoline that you market in Maryland through your existing company stations, is it Ashland refined product? A. Through our existing company stations?

Q. In Maryland. A. No, sir, it is not. It's the gasoline we acquired by exchange as I mentioned earlier from Continental.

* * *

(T. 436) MARY HUDSON VANDEGRIFT,
a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) Mary Hudson Vandergrift, 2900 Corona Road, Shawnee Mission, Kansas.

(Clerk) How is your last name spelled?

(Witness) V A N D E G R I F T.

DIRECT EXAMINATION

By Mr. Drogula:

Q. Miss Hudson, for purposes of your testimony today, would you prefer to be called Miss Hudson or Mrs. Vandegrift? A. I guess I prefer to be called Mary Hudson because that's my business name.

Q. All right. Miss Hudson, you are the president of Hudson Oil Company, is that correct? A. Yes, sir.

Q. Would you please describe for us what Hudson Oil Company is please, how it operates? A. It's an oil company. It operates in thirty-six states and we have approximately three hundred and fifteen service stations; and we are primarily a marketing company.

Q. And do you operate gasoline stations throughout the states that you've just identified? (T. 437) A. Yes, we do.

Q. Does Hudson Oil Company have a refinery? A. No, we don't.

Q. Does Hudson Oil Company engage in the production of crude oil? A. We did at one time, but we do not have production at this time.

Q. In other words at the present time your company is a pure gasoline marketer, is that correct? A. Yes.

Q. Is your company affiliated in any way as a subsidiary or otherwise with a producer or refiner? A. No, sir.

Q. Miss Hudson, how many stations do you have in the State of Maryland? A. We have five stations.

Q. And what brand name is associated with those stations? A. Hudson.

Q. Would you describe for us the kind of stations these are in terms of their physical characteristics? A. They are approximately on two hundred feet of frontage with approximately ten pumps, five islands, two pumps

to a island and usually on a primary street or a U.S. (T. 438) highway number.

Q. Would you tell us what their pricing policy is in terms of pricing your gasoline sold? A. We're considered an independent company and an independent company usually prices two or three cents under the major price.

Q. Are these stations owned and operated by Hudson Oil Company? A. Yes, sir.

Q. Where do you obtain the gasoline that is sold in these stations? A. Are you referring to Maryland?

Q. Yes, ma'am.? A. Ashland Oil Company.

Q. Now, Miss Hudson, you said that you operate these companies as company owned stations. Would you tell the court why Hudson Oil prefers to operate these stations as company operated stations? A. We prefer to operate them as company operated because we have a better control, we can delegate the hours to be open, we can also determine the price we want to sell our gasoline for and also better housekeeping and just—and all around we just feel like it's a better operation for our type.

(T. 439) Q. Is it important for an independent gasoline marketer such as yourself to be able to control the price of gasoline? A. Yes, it is.

Q. Why is that so? A. Well, our stations are built primary to be a very highly competitive station; and price is a very important thing to us because we do not give other services like lubrication, we do not use TB items—TBA items and for that reason we have to depend on a price and a large volume.

Q. Are all of the stations in the states in which you operate company owned and operated? A. Yes, sir.

Q. Have you ever had dealers operating these service stations? A. We tried dealers at one time about the start of World War II for about six months and we found that it did not go very well with our type of operation.

Q. What were the problems at that time that you discovered? A. We completely lost control of our stations. We had dirty stations. The dealer would not carry out the orders; and of course we did not and were not able to enforce certain regulations because they were leased out; and we cancelled our leases and took the stations back over.

(T. 440) Q. Miss Hudson, we have noted in the press that Hudson Oil Company has indicated some intentions as to acquiring a refinery, is that correct? A. Yes, that's right.

Q. Could you tell us when you make a decision to look into this possibility? A. When the energy crisis hit, we found that we had a situation occurred that about thirty-five percent of our stations were closed and we thought our next step—that we should acquire a refinery and this was done about February of this year of the site selection.

Q. A site selection and where did that take place? A. We have a six hundred and eighty acre tract near Houston, Texas.

Q. And have you taken steps to acquire that property? A. We have purchased the property, yes.

Q. What will a refinery do to support or improve your organization? A. We will have a assured source of supply, one that will not be interrupted and we feel that it will be just a much better operation. We'll be able to keep our stations open and operating the hours we would like to have them operated.

Q. All right, are you familiar, Miss Hudson, with the (T. 441) Maryland statute which is the subject matter of this litigation? A. Yes, sir.

Q. Do you support the purposes of that statute? A. No, I do not.

Q. Would you please tell the court how you feel, if you do, that this statute would harm your company? A. Well, first we would have to dispose of our stations here in Maryland and, of course, we do not want to do that. We've been in Maryland for about twenty years; because we are definitely going on with our refining plans and we just feel that to have a refinery and service stations, it's a good marriage.

Q. Well, are you familiar basically with the term backward integration, meaning it's a marketer who acquires a refinery and thereby backs into a refining operation? A. Yes, we would have acquired a refinery before now, but it takes a lot of money and so we feel right now that we're in a position that we can acquire and build a refinery which will be a very beneficial asset to our company.

Q. Do you also feel that your ability to operate a refinery will improve the quality of the services you offer? A. Yes, sir.

Q. Do you feel that your ability to operate a refinery will improve your ability to serve the motoring public? (T. 442) A. Yes, sir.

Q. You've indicated, Miss Hudson, that you purchase your gasoline from Ashland. Are you aware of the fact that Ashland has a private brand operation in this state? A. Yes, sir.

Q. Are you aware that Ashland operates under the names Redhead, Buy-Lo, Hi-Fi—

(Mr. Woodstock) Objection, Your Honor. Suggesting the answer is leading.

(Mr. Drogula) I'll rephrase.

(Court) Yes, it is a leading question.

(Mr. Drogula) I'm sorry, Your Honor, just trying to move along.

Q. Would you please tell us, Miss Hudson, the brands that Ashland operates under to your knowledge? A. Ashland operates Pay-Less, Buy-Lo and Redhead.

Q. Are you familiar with the way that those stations are operated? A. Yes, sir, because I operate in competition with them.

Q. Do they operate similar to the way you operate? A. Yes, sir.

Q. Miss Hudson, do you believe that your company of which you are the president needs a law such as Chapter 854 (T. 443) to protect you from the competition provided by Ashland's stations? A. No, sir.

Q. Why do you feel that way? A. Because I believe in competition.

Q. Do—are you—do you fear competition provided by Ashland's stations? A. No, I do not.

Q. Why is that? A. Because of past experience, forty some years, I've had a lot of experience in competing with Ashland and others.

Q. You feel that you are an effective competitor and can meet that competition? A. I certainly do.

CROSS EXAMINATION

By Mr. Woodstock:

Q. * * * You testified you are contemplating to build a refinery, is that correct? A. Yes, sir.

Q. Where do you intend to get your crude oil from?

* * *

(T. 444) A. We will purchase our crude oil similar to Ashland Oil, we'll purchase it offshore and some domestically.

Q. Do you have any firm commitments from anyone? A. Yes, we do.

Q. From whom?

* * *

(T. 445) A. Well, we have made some arrangements for the offshore crude. We're presently working on some arrangements for domestic crude.

(T. 446) Q. And I had asked you with whom. A. With some Middle East countries. I prefer not to give this because we have a lot of competition in this room.

* * *

(T. 446) Q. I believe you also testified that in 1952 you had attempted to operate some of your stations as dealer lessees, is that correct? I said about 1942.

Q. '42? A. Before World War II, yes.

Q. It was during the war? A. During the war, yes.

Q. How many stations did you try to do that with? A. I believe it was around thirty stations.

(T. 447) Q. Thirty? A. Yes.

Q. How many did you have total at that time, if you can recall? A. At that time, we probably—it was a family group, probably about a hundred and twenty stations.

Q. And have you tried it since? A. No, sir.

* * *

(T. 447) JOHN H. LICHTBLAU,

a witness of lawful age after being duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Drogula:

Q. Please state your full name and present address, sir? A. My full name is John H. L I C H T B L A U and my address—my business address is 122 East 42nd Street.

(T. 448) Q. What is your occupation, Mr. Lichtblau? A. I am executive director of the Petroleum Industry Research Foundation.

(Court) That's in New York, I take it, Mr. Lichtblau? A. Yes, sir.

(Court) All right.

Q. Will you please describe for us the activities of the Petroleum Industry Research Foundation? A. Our work consists primarily of economic research in the area of petroleum and related energy matters. We do studies on the marketing out of international petroleum activities. Things of that sort. We have been doing this for the last twenty-five years.

Q. How long have you been executive director of this organization? A. Since 1961.

Q. Will you briefly trace for us please your prior engagements in this area? A. Well, I worked for the Petroleum Industry Research Foundation for fi–six years before I became executive director. Before that I worked for one year for an oil consulting firm, Walter J. Levy, in New York. Before that I worked for the National Industrial Conference Board as an economist and before (T. 449) that I worked for the United States Department of Labor, from 1950 to 1953 as an economist.

Q. Are you presently engaged in any activities as a consultant in petroleum economics? A. Yes, sir, in addition to my work as executive director I do some consulting with private companies.

Q. Will you describe for us those government organizations first with which whom you have been associated? A. Well, I was a consultant to the Office of Emergency Preparedness on the matter of petroleum economics from 1971 to 1973. That agency, which doesn't exist any longer, at that time was the principal government agency responsible for oil import policy. I also was a consultant for the U.S. Department of State last year and did some–wrote some reports for that agency.

Q. In what areas were those reports involved? A. Petroleum economics.

Q. Have you had any other engagements with government agencies? A. Well, I worked for the Department of Health, Education and Welfare. I'm sorry, that's incorrect. What is it called, Environmental Protection Administration; and I worked for awhile for the government of Puerto Rico as an economic consultant in connection with the project of building (T. 450) new refineries in Puerto Rico.

Q. Mr. Lichtblau, I'd like to hand you a document, a copy of which has been furnished to Mr. Woodstock, which contains biographical data as to your career. Examining that document, would you please describe for us what papers and what writings that you have performed in the field of petroleum economics. A. Well, I've written quite a number of papers over the years, some of these were published, some of them were just given at lectures, at congresses, at conferences. One of the papers that was written more recently was a chapter in a book on competition in the U.S. oil industry which was published by the Ford Foundation's Energy Policy Project. My chapter dealt with the outlook for independent refineries.

Q. Have you had any occasion to teach in the field of economics? A. I once taught a course at the New School for Economic and Social Research in New York in the field of energy. It was called the Politics and Economics of Energy.

Q. Are you a member of any professional or governmental organizations in the field of petroleum? A. Well, I am a member of the National Petroleum Council which is an advisory board to the Secretary of the Interior. You have to be appointed by the Secretary. I'm (T. 451) also on an advisory committee to the Federal Power Commission and I'm a member of the American Petroleum Institute and the American Economic Association.

Q. Would you tell us with a little bit more detail what is the function of the National Petroleum Council? A. The National Petroleum Council is an advisory body made up executives and other experts in the oil industry and it advises the Secretary of the Interior on matters related to petroleum and similar energy problems. It's appointed yearly. Its members rather are appointed yearly by the Secretary of Interior. I've been on the board since 1968. We do all kinds of studies which are then published and I've been on a number of their study committees.

Q. Have you had occasion, Mr. Lichtblau, to testify on petroleum matters before the United States Congress? A. Yes, on several occasions.

Q. Would you describe a few of those occasions for us? A. Well, I testified several times before the Senate Interior and Insular Affairs Committee. That committee did a long term study on the U.S. energy situation and they requested my testimony on several occasions. I testified once on the supply situation. I testified on the storage, the need for strategic storage in the United States; and also I was asked to testify on several bills that were presented by the (T. 452) Administration and the committee had hearings on those bills and asked for expert witnesses; and I was invited among others to testify.

Q. In connection with your activities for the Petroleum Industry Research Foundation, Inc.; do you have occasion to keep yourself informed as to federal energy legislation? A. Yes, sir, I have to do that. That's part of my work.

Q. Have you been familiar with the Emergency Petroleum Allocation Act of 1973? A. Yes, sir.

Q. Are you familiar with the activities of the Federal Energy Administration in implementing those programs?

A. Yes, sir, in general I am.

Q. Mr. Lichtblau, are you also familiar with Chapter 854 of the Laws of the State of Maryland, which is an issue in this case? A. Yes, sir.

Q. Would you please state your understanding as to what that provision requires of entities that are identified as producers or refiners? A. Well, oil refiners would be prohibited from owning and operating stations, gasoline stations in the State of Maryland; and those that are already operating these stations will have to give them up within one year.

(T. 453) Q. Do you draw any distinction between the types of petroleum producers and refiners that operate in Maryland? A. Yes, there are different types. There are the brand operators, that is the refiners that—whose product is well known, is branded by product and then there are non-branded operators. These are the—by type of gasoline the differences. In addition to that you have differences of levels, wholesale operators and retail sales of refiner outlets, refiners.

Q. Are there also distinctions as between majors and independents?

(Mr. Woodstock) Objection, Your Honor. It's leading.

(Court) What's the objection, sir?

(Mr. Woodstock) He just gave his classification for the types of competitors in the retail market; and I believe the question also had a— requested a clarification and gave the answer as to the categorization.

(Court) Overruled.

Q. You may answer, sir. A. Will you repeat the question?

Q. Yes, are there also distinctions as between majors and independents? A. Yes, there are.

Q. How would you identify those entities, refiners and producers who operate in Maryland as majors? (T. 454)

A. The majors are primarily those who operate on a branded basis, that is, their gasoline's principally a well-known, branded, advertised product and the basic sales economics is customer acceptance of the brand name. That is the principal operating form of the majors and their principal form of selling their gasoline is through independent dealers, independent branded dealers. There are other points, but that's the most important, the most frequent form of distributing gasoline for the majors.

Q. And as to independents? A. The independents are primarily selling their gasoline on a non-branded basis. It is not advertised. It is not known so it must compete on something else than the name of the product; and the principal way it competes is through discounts, through a lower price than the branded gasoline.

Q. You are appearing in this case as a witness for Ashland Oil, is that correct? A. Yes.

Q. You've been engaged as an expert, is that correct, and Ashland is paying you a fee? A. Yes, sir, that's correct.

Q. Are you also, therefore, familiar generally with Ashland's role in the petroleum industry? (T. 455) A. Up to a point. I haven't made any special study of Ashland, but I have some familiarity.

Q. Does Ashland fit the category of independents that you've just described? A. Yes, sir, Ashland would be considered an independent refiner under any of the generally accepted definitions of the term.

Q. What are those accepted—generally accepted definitions of an independent refiner? A. Well, an independent refiner generally is one whose crude oil self-sufficiency is either zero or relatively low. That is, a refiner who must buy the bulk of its crude oil requirements from outside

sources at market value as opposed to integrated refiner whose crude oil supply comes to a significant extent from its own controlled sources.

Q. Why are independent refiners motivated to market through unbranded outlets? A. Well, because most of the independent refiners are relatively small, that's small relative to the ten, fifteen largest integrated oil companies. Being small they cannot advertise their product on a wide regional or on a national basis. It wouldn't pay to do that, therefore, they have to find another way of selling their product and that is through price competition rather than through brand competition. If (T. 456) they were the size of the majors, they would operate like them. So size is a very important aspect of branded versus non-branded competition; and out of that fall a number of other things.

Q. Does crude insufficiency influence their marketing strategy? A. To some extent it does.

Q. In what way? A. Historically it does because historically the major companies have been primarily producers and processors of crude oil to a larger extent than obviously the independent companies so that the needs to have a continuous flow-through from crude oil to branded outlets is less for a independent refiner than for a integrated refiner historically because the integrated refiner had access to a natural resource while the independent refiner had to purchase that natural resource.

Q. You mentioned several times in your statement references to the size of the independent refiners and their financial resources. A. Um hmm.

Q. Does this have anything to do with establishing brand identification in the minds of the consumer? A. Considerably, yes.

Q. Would you please explain that? A. Well, the independent refiner simply doesn't have the (T. 457) means to establish the brand name. He doesn't have the financial means, he doesn't have the size, therefore, he has to go the other route; and that is typical throughout the oil industry, virtually all independent refiners except in some areas, usually areas close to their own refinery, outside of those areas the bulk of their product, their gasoline is sold on a non-branded basis.

Q. In your opinion, Mr. Lichtblau, could an independent refiner compete successfully with major branded operations in distant markets through the marketing strategy followed by the major company? A. Probably not. I mean there have been some instances where it has happened, but by and large, he would find it very difficult because he couldn't use a branded name since he doesn't have one, since he can't afford to build one, therefore, he has to use some other means of selling his product; and that other means is discount. Now the only way you can sell your product at a lower price, if you're an independent refiner, is to do something to lower the cost of your distribution because certainly your crude oil cost is at least as high as that of the major. It's likely to be higher, but it can never be lower because the major has direct controlled access to crude oil, the independent does not. So that at the crude oil level there is no savings (T. 458) possible. Refining runs, refinery operation costs is it anything lower for the very large company because of the economy of scale. So the only way he can sell gasoline at a lower price than the major and the branded one is to utilize the volume of his outlet, that is, maximize gasoline sales at his station because gasoline sale is a very high capital intensive, capital intensive outlet, which means that the more gasoline you put through that unit, the lower is your unit cost. So that

what is typical of an independent gasoline outlet is a very high throughput unit compared to the branded major gasoline outlets; and if you have that very high throughput, you then can afford a lower per unit margin and undersell the branded major.

Q. We have heard testimony in this case, sir, about three different kinds of companies in the industry, the majors, the independent refiners and the independent marketers. In your opinion do independent refiners more closely resemble in their marketing strategies major companies or independent marketers? A. No, I think they resemble much more closely the independent marketers because both independent marketers and independent refiners sell a non-branded product, they sell it at discount prices and they are able to give those discounts because of volume throughput; and they also are primarily—they're outlets, sellers of gasoline rather than suppliers of (T. 459) other services such as the branded stations generally are.

Q. From your experience, do independent gasoline marketers who are not associated with producers or refiners generally operate their stations through company owned facilities? A. Independent marketers?

Q. Yes. A. They operate themselves, independent marketers.

Q. All right; and why do you believe that they do that? What is—why is that consistent with their marketing strategy? A. Because of the large throughput, because there's a need to keep your stations open for a long time. There's a general need to—for a different type of management than you have for your branded major outlet.

Q. In these respects is the need of the independent refiner any different from the need of the independent marketer? A. No, that's right, they would be the same because their type of marketing is the same.

Q. From again your experience and your analysis has Ashland's marketing strategy enabled it to compete effectively in the industry? A.Yes, Ashland is an aggressive competitor, has maintained–well, increased its market share generally, it's considered one of the better run companies in the industry.

Q. Would you–we've also heard mention of terms such as (T. 460) price maker and price follower. How would you categorize Ashland Oil or if you give any credence to those classifications? A. Really I don't, I don't think it's quite clear who is a price maker and who is a price follower in any given market.

Q. Would you amplify that please? A. When prices change, someone makes the change and someone else is the follower and that difference between as to the price maker and the price follower, but I think from what I have seen it is very difficult to establish who is the price follower, who is the price maker in any given price change, price reduction or price increase, so I really don't know who to qualify, classify the price leader and as a price follower.

Q. Does Ashland's ability to operate company owned facilities enhance its position as an independent refiner? A. Yes, yes, it does.

Q. In what way? A. Because if it didn't have that, obviously it would find it very difficult to operate those stations through independent branded dealers because as we said before independent branded dealers have a different type of operation. The volume is generally much lower. It would be very difficult to get the kind of volume through independents branded oper– (T. 461) actions–independent to–independent operation than through company owned operations. So if the volume were lower, there would be no way for Ashland to give the kind of discount which is necessary to sell its gasoline; and if it

couldn't sell its gasoline through its retail outlets, it would lose a whole section–segment of the market.

Q. Given their high crude acquisition costs, in your opinion do independent refiners need marketing outlets other than general wholesale transactions? A. Yes, they do, simply because–

Q. Why is that? A. Well, a refinery has to have sufficient outlets, a refinery is a pumping, hourly operation, you cannot shut it down for a day and then pick it up again. So you need a continuous stream of outlets, stream of sales at all times. Now wholesale markets are very, very volatile. You may have a wholesale account one day and because of a fraction of a penny a gallon, he may leave you and go to someone else, independent wholesale accounts, so if you had to do your entire business on the basis of selling to wholesale, independent wholesale markets, you could at a very volatile, which would be very difficult for your refiner to operate. Having your own outlets, your own company controlled outlets assures you of a continuous, steady market for your gasoline particularly (T. 462) since you control these stations so to that extent it is necessary to have this sort, this source of outlet for any–for a non-branded refiner.

Q. If Ashland were obliged by the effectiveness of this statute to withdraw from the Maryland market, what would the impact be on competition in Maryland? A. Well, if Ashland were obliged to withdraw, it would have to do something about its gasoline stations, the seventeen stations which it owns presently, it would have to dispose of these stations and the effect on competition would be to reduce it because probably some of the stations would not even be sold to any other gasoline marketer. Some of the stations may just end up as being sold for retail or for some nongasoline outlet, some of them may be just shut

down for an indefinite period. There is, of course, there are, of course, those that would buy these stations for gasoline purposes, some might be independent marketers such as the type that Ashland operates. Some might be branded dealers to the extent of which they are branded dealers or companies that buy the station on behalf–for branded dealers with the least amount of these branded dealers, to the extent to which these will be the purchasers, the gasoline would then be sold at branded price level which would mean it would be higher than the gasoline prices of independent marketers–refiners such as (T. 463) Ashland charged so the double effect would be that there would be a reduction probably in the number of stations and some of the stations that would continue to sell gasoline might sell so at a higher price than at present.

Q. If all such companies such as Ashland who are private brand marketers and who are associated with a producer or a refiner were obliged to withdraw from Maryland, what effect would that have on the price of gasoline? A. It would raise the price of gasoline throughout the state because these private–we said these private brand marketers are discount marketers, if they were no longer allowed to operate here, these private brand refiners and discount marketers and if they were no longer allowed to operate here, as I said some of them would obviously go to kind of brand operations. There would be a withdrawal from the market; and any withdrawal from the market is likely to have anti-competitive results.

Q. We've heard testimony generally as to barriers to entry in the State of Maryland. Can you conceive–strike that. Could Ashland or an independent refiner enter the State of Maryland assuming that it is a territory distant

from their refineries through branded marketers? A. No, unless they go through the whole process of advertising, of getting their branded–their name branded which (T. 464) would be very expensive and particularly if it's just done on a single state basis so that by and large they would not be able to do that.

Q. You indicated that as a course of your responsibilities you're in contact with federal energy legislation. Did the Federal Government determine to treat the independent refiners and independent marketers jointly as the classes to be protected under that legislation? A. In the Federal Allocation–Petroleum Allocation Act in the preamble it specifically states that it is the function of the Act to protect the independent refiners, small refiners and independent marketers. It is specifically mentioned in there.

* * *

(T. 466) CROSS EXAMINATION

By Mr. Woodstock:

Q. Mr. Lichtblau, assuming Ashland decided to leave the day after the Act was upheld as being constitutional, would anything prohibit a person like Mrs. Hudson, who was just sitting there a moment ago, as of today her current status from coming, in, taking over those stations and continuing to market gasoline to the citizens of the State of Maryland at two to three cents under very major in the state? A. No, that will be possible.

Q. To the best of your knowledge as an expert in the oil industry, are there other individuals and other small companies that are not associated with a producer or a refiner who operate retail service stations? A. Yes, there are, but I doubt that there are enough such stations to be able to take over all the stations that would be prohibited under the statute. You're talking about something like a

hundred and eighty stations in the State of Maryland; and there are not that many independent marketers to take over that many stations. So I doubt whether in that situation all of these stations or the majority of them would be taken over by the Hudson-type of operation. Some would be I'm sure of it, but as I said some would not and some would be taken (T. 467) over by branded ones. So that you would have a net loss.

Q. Loss of what, numbers? A. Of numbers and also an increase probably in the price of gasoline, the average price of gasoline.

Q. Would this number prohibit such people that market gasoline in the State of Maryland, like J. C. Penney from continuing to do business? A. I don't think so—

Q. Would Sears Roebuck? A. No, they could continue. They're not affected by this law.

Q. Quarker State? A. No, they would not be affected by the law.

* * *

(T. 467) Q. Isn't it possibly, then, that the void can be least in part be filled by new competitors entering the field? A. In part in undoubtedly would, but that's my point. (T. 468) That in part it would not.

Q. Are you familiar with the FEA reports on the effect of the shortage on the independent markets in America? A. Yes, yes.

Q. Are you familiar with that bulletin that discussed the various types of statistical analysis undertaken? A. Yes.

Q. The result of which was FEA decided we have to do our own? A. Well, but they are—they also came up and showed us the shortage that existed or rather the problem that existed for the independent marketers was a temporary situation which was removed when the crude

oil situation changed and when the refinery shortage of 1973 no longer existed. This whole situation which caused all these problems was temporary and was due to factors totally beyond the control of the State of Maryland or had nothing to do with anything happening in the State of Maryland. It was a national and international problem which the Federal Energy Agency tried to react to and so did Congress.

Q. Assuming that the Act was—it went into effect and these people did leave the State of Maryland. Would that affect the overall demand for gasoline in this state? A. It would affect the ease with which the public (T. 469) could buy gasoline because any station that is now selling a hundred an twenty or a hundred and thirty thousand gallons, if that station no longer exists among—that means that that many customers would have to go somewhere else aside from any price effect. It would mean that a service would no longer be rendered. If a station is one place and that station is no longer there, it means that those who are—finds this the most convenient station would no longer have access to this particular point. So it would be some kind of a disservice to the consumer.

Q. Do you know how many of the Ashland stations, for example, within half a mile radius of them have ten competing stations within it? A. That's half a mile.

Q. And that's what you would call an inconvenience? A. It could be five miles in some cases. I don't know exactly where these stations are located; and, of course, Ashland has seventeen stations altogether. I think a hundred and eighty stations are at stake. I don't know where they're located, but they are somewhere where someone finds it better to go there than anywhere else; and some of these stations would no longer exist under this law.

* * *

(T. 476) (Court) Mr. Woodstock?

(Mr. Woodstock) May it please the court, State would like to make the motion to the court at this time that the court's summary judgment as to Paragraph D of Chapter 854 of the Laws of Maryland of 1974 be especially determined to be and entered as a final judgment from which an appeal can be taken and that the remainder of these proceedings be stayed pending that appeal. It's the State's position that the ruling has seriously diminished the State's ability to present its case in chief in defense of this statute, that our evidence was developed over the last four to six months on the basis of defending this statutory scheme and that as a result of going through the direct examination of Plaintiff's case and the State's exercising its ability to cross examine and finding that that ability was severely restricted in his approach to cross examining those witnesses; and that this matter—this bill, this regulation of this particular industry is of such vital importance to the State that we would—we are faced with a position of not being able to adequately and fully present our defense to the best of its ability. Lastly, Your Honor, we also feel very strongly that the court's ruling on Paragraph (T. 477) D is possible of reversal as a matter of law and—

(Court) No question about that.

(Mr. Woodstock) We'd like to seek the right to do that and have these proceedings stayed until such time as we get a ruling on that matter.

(Court) Mr. Noonberg.

(Mr. Noonberg) If the court please, speaking on behalf of Exxon, we would oppose very strenuously any effort to stay the proceedings in this case. Two reasons, first, we think it is entirely inappropriate for the State to take the position now after the Plaintiffs have completed their case for the State to take the position that it must now

appeal before it can effectively present its case. If at all, the time for making that sort of a motion, which I don't quite understand, would have been at the time of the court's ruling. Having elected not to do that, it seems to me incumbent upon the State to go forward with their case. So we would oppose a stay. Of course, the State can rest its case at which point an appeal would lie from the court's final determination.

(Mr. Preston) On behalf of Continental and Kayo we also oppose the request of the State under 605 for the entry of a final decree and the right to appeal at this time. Our reasons are the same as those just cited by Mr. Noonberg on behalf of Exxon. I point out to the court that the object (T. 478) of Rule 605 is to be able to obtain in a timely and continuous fashion hearings on all matters. The expense before Your Honor in this case is obvious, not only from the experts, but while counsel may not be quite as dear nevertheless there has been a large number of them during this entire trial in court. We've put in a great amount of time. All of this was well known to Mr. Woodstock at the moment of Your Honor's ruling. He did not at that time make any motion under 605, but instead took the option of sitting here allowing us to try our case and see if he would how it went at the end before making this motion. I submit to the court that it would be terribly unfair, a great expense and not be in the interest of justice at this time. As Mr. Noonberg points out to the court, Mr. Woodstock and the State have the option at this time of resting their case, of concluding this trial, but it is not fair to end this case on any kind of a stay at this time. We have tried this statute, and I point out to the court that a large number of the Plaintiffs in this case, my clients included, did not file suit under Section D since we do not have dual distribution patterns, do not have dealers in this State

and did not file suit under Subsection D, the TCA or TBA sections. That goes for Continental and Kayo, I believe for Commonwealth, PMC and I believe for Ashland also; and I ask the court to overrule Mr. Woodstock's motion; and it will be his decision on behalf of (T. 479) the State how to conclude this trial on the matter that we have been before Your Honor on this week. He has his witness present and is ready to go forward on Sections B and C; and he should do so.

(Court) Don't you think it does put the Plaintiffs at a very serious disadvantage, Mr. Woodstock?

(Mr. Woodstock) No, I don't, Your Honor.

(Court) Why not?

(Mr. Woodstock) Furthermore—if I could lay the groundwork first before I respond to that directly, as the court knows we have not had the opportunity to review the written opinion of the court's decision on that summary judgment.

(Court) I think I changed a word or two.

(Mr. Woodstock) Well, to this evening and the opportunity to sit down and review it in any detail was not available till last night. So we're just not sitting here passing the time and would not have made the motion unless I thought it was absolutely necessary. As far as the inconvenience to the Plaintiffs, I think that justice may require inconvenience to certain people at certain times, but does I believe inhibit us from putting on the full defense that this statute deserves for the reasons I've stated previously.

(T. 480) (Mr. Greenwald) Your Honor, may I be heard on this?

(Court) Yes.

(Mr. Greenwald) On behalf of Gulf Oil Corporation, I fully join in the comments made by Mr. Noonberg and Mr. Preston. I'd like to add that if Mr. Woodstock is

unable to go forward as to B and C, it can be only for the reason that in the view of the State of Maryland the entire statute is invalid without Paragraph D. If that is not the case, then he should be able to try B and C on their own merits right now; and if it is the case, B and C must fall, if D falls and that very well may be the case, then Mr. Woodstock as Mr. Noonberg and Mr. Preston have pointed out has the option of resting the State's case right now and appealing the entire statute right now.

(Mr. Drogula) Your Honor.

(Court) Yes, Mr. Drogula.

(Mr. Drogula) Very briefly, we subscribe to the views that have been expressed. In addition the rule that is designed to prevent piecemeal appeals could produce exactly that result if Mr. Woodstock's motion is approved. We could have an appeal at this time upon the partial summary judgment only to have that affirmed and find ourselves facing another appeal after a further extended hearing. So we strongly urge (T. 481) the court overrule the motion.

(Mr. Davis) Your Honor, on behalf of Phillips, we join the other Plaintiffs' counsel in opposing the State's motion at this time.

(Mr. Abrams) Your Honor, on behalf of Shell, we also—we subscribe to all of the remarks stated and would like to point out one further fact, Mr. Woodstock was aware of Your Honor's ruling the first day and the first hour of this trial; and the ruling as a matter of law it was not necessary to wait until last night to read Your Honor's opinion. It was the legal ruling quite clear.

(Mr. Reid) May it please the court on behalf of PMC—

(Court) Mr. Reid.

(Mr. Reid) —and Commonwealth we also join the opposition to the motion. I would like to add that the rule which Mr. Woodstock calls into play here is a rule

that is contrary to the general concept of appeals in the State of Maryland that there shall not be piecemeal appeals. It is akin to the federal rule that where there are unusual circumstances an interlocutory appeal may lie where the result will be in the discretion of the court a savings of time and a possible expedition of the case. Those factors are I think, required to be found in order to invoke an appeal under Rule (T. 482) 605 and it seems that after the case is at least half concluded and the Plaintiffs have rested there could be no such finding.

(Court) The court is inclined not to allow the motion. As I have previously remarked, at the beginning of the case upon giving my reasons from the bench as to reasons for sustaining the motion for summary judgment my purpose was to curtail as much as possible trial time which I felt would be unnecessary in view of the posture of the case which I felt justified acting on the motion as it did. I feel that at that time the Attorney General himself was present in the court room and I think it would have been incumbent upon him as team captain so as to speak to advise as to whether or not the State wished to invoke the provisions of Rule 605. The State has had the benefit of all the testimony as to the balance of the statute which the court felt was still subject to consideration; and I think the State must now decide whether to proceed with its case or to rest its case and allow the appeal to be taken. Obviously if this member of the court is wrong as to its ruling on Paragraph D, there is only one thing that will be done. The case will be remanded for the taking of additional testimony; and I suppose at that time the situation can follow the normal course if such takes place; but I do feel that the State had the option as of the time of the announcement and certainly it shouldn't have been a surprise. As I recall it, the argument (T. 483) was made back last summer; and

previously this member of the court indicated that it would arrive at its decision as early as possible not only as to the matter under motion for partial summary judgment but as to the entire case as soon as presented. So for the State now to claim to surprise as a result of the court's acting in an expeditious manner, I don't feel that this is something they could not have anticipated.

The court does not necessarily side with the State in every case it undertakes. There would be no point in having the court if that were the case; and therefore, I feel that it is now incumbent upon the State either to proceed or to rest its case and take the appeal.

* * *

(T. 484) JOHN KING COLEMAN,
a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) My name is John King Coleman, I reside at 212 Sycamore Road, Severna Park.

DIRECT EXAMINATION

By Mr. Woodstock:

Q. Mr. Coleman, would you please tell the court what is your present occupation? A. I am the chief of the Gasoline Tax Division for the State of Maryland.

Q. How long have you held this position? A. For approximately fifteen years.

* * *

(T. 485) Q. And if you would briefly describe the duties and responsibilities of your position? A. We enforce the motor fuel tax law under Article 56 of the Annotated Code, which also includes your subtitle number for motor fuel inspection law. We're also charged

with the responsibility of enforcing the motor carrier law under Article 81 of the Annotated Code of Maryland.

Q. To whom do you report, Mr. Coleman? A. I report to Comptroller Louis L. Goldstein.

Q. Can you give us an idea of how many people are employed in your division? A. We have approximately ninety-six employees, we're also assigned six State Police full time.

Q. Within that division is there various areas of designated assignments that you could describe for us? A. The division budgetarily and administratively is broken down into three divisions or three programs. The primary program being an administrative program to cover all of the accounting functions and day-to-day business. We have an audit program to conduct field audits of the licensed taxpayers that we're charged to receive reports from. A (T. 486) third program is the motor fuel inspection program and they are responsible to periodically sample and inspect at retail and wholesale all of the petroleum products covered by the Act.

* * *

(T. 487) Q. Mr. Coleman, does your division generate any regular type of reports in conjunction with your gasoline tax collection (T. 488) activities? A. We are completely involved with EDP in just about every facet of activity we have. Starting with the day-to-day receipts, they come into the department from the various oil companies, diesel users, sellers and motor carriers. These daily activities are wedded into monthly reports, into fiscal reports covering taxable gallonage, tax resales made, where they're permitted by law. We provide delinquency controls for taxpayers who are delinquent, as well as assessment of penalties and interest.

Q. Does your office generate any other type of reports? A. There are numerous reports feeding out of

the computer system pertaining to monthly activity of each company that we're receiving these things from known as the Gallonage Report on a monthly basis and an annual basis.

Q. Is your division the only division within the Comptroller's office that has anything to do with gasoline taxation? A. We at the present time are the only ones making any activity or are in charge of any activity of collecting motor fuel taxes.

Q. Mr. Coleman, from the various types of reports you identified that your office generates on a regular basis is it at all possible to identify at any given time the total amount (T. 489) of gasoline sales from retail service stations for any given period of time? A. No, it is not.

* * *

(T. 489) Q. To the best of your knowledge do you know of any other state gasoline sales tax division or office which has a system capable of generating information regarding the daily or to any period of time actual retail sales of gasoline from retail service stations in their state? A. At the present time I can only recall one state having that possibility and that would be the State of Georgia where they're involved in making refunds back to retail service station dealers in the form of a collection allowance.

Q. But presently in the State of Maryland there is no such capability from your computer network, is that correct? A. Not at the present time.

* * *

(T. 490) Q. Were there any other special reports or investigations undertaken by the Comptroller's office or your division at the request of the Governor during this period of time? A. We had the initial request from the Governor's office (T. 491) to the Comptroller to conduct

an investigation as to the extent of the gasoline supplies in Maryland I believe in June or May of '73.

Q. How were you informed about that request? A. I was sent a memorandum by the Comptroller with a copy of the Governor's letter to him requesting that such an investigation be conducted.

Q. Mr. Coleman, I give you this document and ask if you can identify it. A. This is the letter I received a copy of from the Comptroller by the Governor.

* * *

(T. 491) (Mr. Woodstock) * * * I'd like to offer this into evidence.

(Copy of letter filed herewith as evidence as State's [Defendants'] Exhibit #A)

Q. Following the receipt of the memorandum from the Comptroller and the copy of the Governor's letter, Mr. Coleman, what did you do to actually implement and undertake this study? (T. 492) A. I requested a meeting with several of my staff members, including Mr. Arthur Price, who is chief of the motor fuel inspection, and delegated him the authority to proceed to draft a questionnaire in survey form to be sent out to the retail service station dealers.

Q. Did Mr. Price do this? A. Yes, he did.

Q. Did you at any time review the product of his work? A. Yes, I did.

Q. Can you identify that document, sir? A. This is a copy of a letter that was mailed to all retail service station operators from the Comptroller requesting assistance and cooperation in completing the survey forms that were mailed to them to try to get some measure as to the availability of motor diesel fuel in the State of Maryland.

Q. Is that the document that Mr. Price brought into you? A. This is the one that he completed and I approved for issuing.

(Mr. Woodstock) I'd like to offer that, Your Honor.

(Court) Admit it.

(Copy letter filed herewith as evidence as State's [Defendants'] Exhibit #B)

Q. Can you tell me, Mr. Coleman, to your knowledge what subsequently was done with the questionnaires that were mailed? (T. 493) How were they mailed? A. We used the registration file of the motor fuel inspection program which is computerized to print mailing labels of all the retail service station operators actively in that file at that particular time.

* * *

(T. 494) Q. Mr. Coleman, did anyone else look at this questionnaire prior to– A. Yes, I did show it to the Comptroller, tried to describe what we were trying to portray and get from the retail dealers as a response if any to the questionnaire.

* * *

(T. 495) Q. In your opinion would this survey form help you or assist you in collecting the data nec–that you felt would be necessary to reply to the Governor's request?

* * *

(T. 495) A. We designed the questionnaire with the cooperation of Mr. Price and his staff. Several members of his staff had been employed at various levels including retail service station operators, bulk plant and personnel. They felt that the material requested in the survey would help, assist the Governor in determining whether the complaints were valid that he had been receiving as to shortages at some retail stations.

Q. Can you tell us, Mr. Coleman, if any of the questionnaires that were mailed out were returned to the Comptroller's office? A. Yes, approximately fourteen hundred were returned to our office.

Q. And what happened to those questionnaires upon their (T. 496) receipt at the Comptroller's office? A. Upon a receipt in the Comptroller's office, Mr. Price's personnel started to assemble the responses from the questionnaires.

* * *

(T. 496) Q. Mr. Coleman, was there any other surveys prepared in conjunction with the Governor's request? A. There were follow-up surveys made where some retail service station operators went beyond the realm of the survey request; and proffered information above and beyond what we asked for. I specifically instructed Mr. Price to assign field representatives to personally interview those individuals.

Q. Subsequent to the mailing of the survey questionnaire to the retail service station dealers, did your division attempt to contact the major oil companies doing business in the State of Maryland? A. Mr. Price's staff and some of my assistants assisted in preparing a survey questionnaire to be mailed to the major oil companies.

Q. I hand you a document. Can you identify that document please? A. This is the questionnaire that we mailed to the (T. 497) major oil companies to obtain information.

(Mr. Woodstock) Your Honor, I'd offer that, State's Exhibit #3, I believe, or C.

(Court) C.

(Questionnaire filed herewith as evidence as State's [Defendants'] Exhibit #C)

Q. Now, Mr. Coleman, did you have a final approval or did you review this form before it was utilized? A. That is correct.

Q. To whom was that mailed? A. That was mailed to approximately twenty major oil companies that do the major importing and marketing in Maryland.

Q. And this was mailed after the retail service station dealer questionnaire– A. That's true.

Q. –is that correct? Did any of the oil companies to whom you had mailed the questionnaire return the questionnaire? A. The best I can recall eleven companies, I believe, returned the questionnaire, nine of them returned it fully completed. A couple of the companies objected to providing some of the information requested in there as being trade secrets and confidential information.

(T. 498) Q. After the receipt of these returns, did your office undertake to compile an analysis or report of that information? A. That is correct.

Q. Who was in charge of or responsible for doing that? A. Mr. Price was responsible for the analysis of the retail dealers and some of the analysis on the dealer–the surveys.

Q. I ask you to look at that document, sir. A. This appears to be the final analysis of the results from the retail service station dealer questionnaires.

(Mr. Noonberg) If the court please–

(Mr. Woodstock) I'd like to offer this into evidence, Your Honor, as the report prepared by John Coleman, Chief of the Gasoline Tax Division, response to the request by the Comptroller to comply with the request of the Governor.

(Mr. Noonberg) If the court please, we would object to its admissibility for a couple of reasons. One, I think Mr. Coleman just testified that Mr. Price prepared it and he did not, but more importantly it is about three levels of hearsay if what it purports to analyze is a response from an unnamed, unsigned individual returning a response to a questionnaire to an individual outside the court, then analyzed and compiled by someone out of the court and constitutes about three levels of hearsay.

(T. 499) (Court) Why doesn't it come in on the shopbook rule?

(Mr. Noonberg) I'm sorry, Your Honor.

(Court) Why doesn't it come in under the shopbook rule?

(Mr. Noonberg) Well, because I think that the witness has testified that this was not a regularly prepared report under the auspices of the Comptroller's office. It was a report specially undertaken and specially designed, and I think, therefore, could not come in under the shopbook rule. I would add, Your Honor, that the principal thrust of our objection relates to the admissibility to the truth of what is contained in it. I think that we have no dispute about the fact that what Mr. Woodstock has informed us and I think Mr. Coleman has informed us that this document was prepared and was at least submitted to some legislative committee. We do not dispute the fact that it was, if they say so, was so submitted. For a limited purpose and not for the truth of what it contains, we would have at least as far as Exxon is concerned, we would have no objection.

(Mr. Woodstock) Your Honor, may I address the point of the document?

(Court) Go ahead.

(Mr. Woodstock) The document is not necessarily (T. 500) being offered for the truth of its conclusions. The fact of the matter is the document is—was produced in the normal course of their business activities. Part of the Comptroller's responsibility is to respond and to reply to the Governor; and furthermore it was without question I might add by stipulation they've admitted the fact that this document was subsequently produced to the legislative committees considering the bill. And I'm not ask—and I have no way of knowing whether or not the respective legislators considered what was in that report, but it is part of the legislative history because the testimony and prepared speeches, which we'll seek to

introduce later on in our case, clearly make reference to this report being introduced, therefore, it should be considered part of the legislative history.

(Court) Admit it.

(Mr. Noonberg) I'm sorry, Your Honor.

(Court) I say I'm going to admit the document.

(Mr. Noonberg) May I just make one brief comment, Your Honor, and that is Mr. Woodstock did say he was not admitting it—he is not submitting it for the truth of what it contains and on that basis we have no objection.

(Court) All right, let's have it come in and not bat it back and forth any more.

(T. 501) (Analysis filed herewith as evidence as State's [Defendants'] Exhibit #D)

Q. Mr. Coleman, you also—I don't think you did testify—Mr. Coleman, to the best of your knowledge after you gave that particular report to the Comptroller, as I believe you previously testified to, did the Comptroller in turn pass it on to anyone else? A. At a later date, he submitted it to the Governor.

Q. Mr. Coleman, with regards to the second questionnaire to the major oil companies, to the best of your knowledge was there a report or analysis done of the returns to those questionnaires? A. That is correct.

Q. Whom in your division prepared that report? A. The analysis of the survey primarily was prepared by Mr. Price and with some collaboration I'm sure myself on the price surveys that were returned.

Q. I ask you if you can identify that document. A. This document consists of the analysis from the major oil company response to our questionnaire that we mailed to them; and it also contains the analysis of taxable and exempt gasoline sales for the calendar year '71 and '72 and the first six months of '73. This was prepared by

myself taken from the computer records with assumptions made in some instances by myself as to trade journal articles alluding (T. 502) to Ashland Oil, for instance, had the crude problems, trying to evaluate ups and downs in percentage of the share of a market that took place with some of the oil companies in an attempt to justify those statements. There are some statements that are in this report that were also tied in with the retail service station dealer survey which were prepared by Mr. Price.

Q. And was this document in turn presented to the Comptroller by yourself? A. That is correct.

Q. To the best of your knowledge did the Comptroller in turn send this on to the Governor? A. I'm positive he did.

(Mr. Woodstock) Your Honor, we'd like to offer this then as Defendants' Exhibit E.

(Mr. Noonberg) Your Honor, our position would be the same and I assume the court's ruling would be the same.

(Court) Yes, sir.

(Analysis filed herewith as evidence as State's [Defendants'] Exhibit #E)

Q. Mr. Coleman, do you as chief of the gas tax division in the course of your official responsibilities have any evidence whatsoever as to any of the specific Plaintiffs in this case or any other major oil company doing (T. 503) business in the state as to having misallocated their product between company owned and operated service stations as opposed to their independent dealer lease stations? A. No, we do not.

Q. Did you in the course of your investigation and this questionnaire activity on the part of the Governor receive any complaints from anyone regarding such allegations of misallocation? A. Yes, we did.

Q. Would you briefly describe the nature of those complaints? A. We had complaints from–

(Mr. Preston) I object to this and I don't know who he's talking about, who they talked to, don't even know whether complaints, alleged complaints were made to him or who made them.

(Court) This is not a report to the usual–

(Mr. Woodstock) Your Honor, if I may.

(Court) Form of business.

(Mr. Woodstock) I believe in the negotiated pretrial order for–now if it's necessary we're prepared to do so, but I don't really think the court wants us to, all of the information, the written complaints that came into the Comptroller's office with regards to the questionnaires (T. 504) and accompanying the questionnaires, all the work sheets that will be introduced through this witness and another witness, they're all there and we're ready to produce them if Plaintiffs would like us to lay the foundation for all the final reports and analysis; and we'll have to inform the court it's at least three or four boxes of documents. Now Plaintiffs have seen these and I think if they had objections to these documents they would have voiced it before we negotiated the pretrial order.

(Court) Mr. Woodstock, it's not the court's understanding that simply because a document has been seen by the adversary that it necessarily is an exception to the hearsay rule.

(Mr. Woodstock) Once again, Your Honor, I believe that it's an exception to the hearsay rule for these documents to come in as not for their truth but the fact that they were offered by the Comptroller to the Legislature, to their committees, they were received by the committees; and I think that makes it somewhat part of the legislative history to this bill or at least a considerations offered to the Legislature for enacting–

subsequently enacting the bill that is involved in this litigation.

(Court) Well, that wasn't your question though. Your question was entirely different, did he receive. (T. 505) Now you're offering a different premise and not one related to the nature of the objection as I understood it.

(Mr. Woodstock) I'll withdraw the question.

Q. Mr. Coleman, did your office undertake any special audits regarding possible misallocation during the period of shortage? A. Yes, we did.

Q. Could you identify those? A. We completed four audits, H. L. Mills, a jobber and retail service station operator operating in Hagerstown, Savon Service Station—

(Court) What was in Hagerstown? A. H. L. Mills.

(Court) Now—all right.

A. Holmes Oil Company, they operate retail service stations; and Midway Petroleum, they operated I believe twenty-one service stations in the Baltimore City area.

Q. What prompted you to undertake these audits? A. Mr. Mills did come in to visit with the Comptroller.

(Mr. Preston) I object, Your Honor, to what Mr. Mills said. Once again I don't know who it was or anything else.

(Court) Well, I'll sustain the objection.

Q. Mr. Coleman, I ask you to identify the documents (T. 506) in that folder for me. A. These are the work papers of our field auditor in regard to an audit of H. L. Mills retail service stations during the period of 1971, 2, 3 and I believe the first six months of '74, showing the purchases by suppliers.

Q. From where is that information obtained? A. This was obtained from Mr. Mills' records at his office location.

Q. I ask you to identify those documents in that folder. A. This is the audit of Midway Petroleum Incorporated in Baltimore showing the number of service stations they had in operation, the dates they were opened, the dates they were closed, the gallonage that Midway had purchased during the period of '71, '72, '73 and the first six months of '74 and the source of supply of the gasoline.

(Mr. Drogula) Your Honor, may we request the dates of the audits that were conducted he indicated?

(Court) Do you have the dates, Mr. Coleman? A. Approximately the month of July of '74.

(Mr. Woodstock) Your Honor, if I may, that was for the Midway documents.

Q. Do you have any date for the Mills'? A. December 31, 1974 covering the audit period of (T. 507) January 1, 1971 through December 31, 1974.

Q. Identify those please. A. This appears to be an audit of Holmes Oil Company, Incorporated at Washington, D.C. covering the period of January 1, 1971 through December 31, 1974, then showing the station locations, the date they were closed, the date they were opened, the amount of gallonage purchased from a supplier for the period of '71, '72, '73 and '74.

(Mr. Noonberg) Could you give the date that the audit was prepared, sir? A. I would assume it was after December 31.

(Mr. Noonberg) Of 1974? A. That's right, normally the audit covers—the thing covers a substantial period covers and it's closed out at December 31st.

Q. And that last file. A. This is an audit of the Aero Oil Company which operates the Savon stations and it covered the period of January 1, '71 through June 30th, 1974, again showing station locations, dates they were

opened and closed and the gallonage purchased from the supplier for the period '71, '72, '73 and six moths of '74.

Q. Under what circumstances were these audits undertaken by your office?

(T. 508) (Mr. Preston) I–

A. I'm not sure I understand your question.

(Mr. Preston) I don't either.

Q. Does your office normally undertake audits of this nature as part of its normal duties? A. We would audit Aero Oil in the course of our normal duties, Holmes Oil under our normal duties. I believe Midway would also be subject to an annual audit or every two year audit on special fuel sales.

Q. Did you request as chief of the gasoline tax division that these audits be made of these particular companies? A. To this extent, yes.

Q. For what purposes, sir?

(Mr. Preston) Objection.

(Court) What's the objection, Mr. Preston?

(Mr. Preston) Well, I suspect that what Mr. Woodstock wants him to say for what purpose is that somebody said something to him about it. I don't know, but I don't think the purpose is material. Whatever the audits show assuming that they're admissible and I don't whether they are or not, they would show. I don't see the purpose of the audits.

(Court) Up till now I haven't heard anything about–

(Mr. Preston) I don't know what–

(T. 509) (Court) –Midway, Holmes or Aero and are they parties to this suit?

(Mr. Noonberg) No, Your Honor.

(Court) Is the State maintaining that all oil companies are tarred with the same brush?

(Mr. Woodstock) The State's maintaining that during this period of time before the legislation was considered

and during the part of that period of time when the Comptroller's office was undertaking the investigation and survey at the request of the Governor and continuing thereafter that they did come across instances where independent retailers had their supply cut off by producers or refiners doing in the State.

(Court) By whom?

(Mr. Woodstock) And if–that's what in the audits, Your Honor.

(Court) All right, go ahead. Ask your next question.

Q. Mr. Coleman, how did you come in possession of these audits? A. By the manner of assigning a field auditor to specific detail of doing that type of audit on these locations. In the one instance based–on one of the accounts there and making the statement to the Comptroller and myself–

(Mr. Preston) I object.

(T. 510) A. –that he was experiencing difficulty.

(Mr. Preston)–as to what one of these people said to the Comptroller or to Mr. Coleman.

(Court) Well, I don't know that that's being offered for the truth of what was said so I'll overrule it.

Q. Mr. Coleman, can you generally describe for us please the contents and what these audits reflect with regards to these respective accounts?

(Mr. Greenwald) Excuse me, Your Honor, I–

(Mr. Preston) I –I object.

(Mr. Greenwald) –those documents speak for themselves if they are admissible and I'm not at all sure that they are.

(Court) I agree.

Q. Mr. Coleman, has your office ever performed any audits of any of the Plaintiffs in this lawsuit other than in the normal course of your regular monthly and quarterly duties? A. Yes, we did.

Q. Such as, sir? A. We conducted one audit of the allocation program imposed by Exxon Oil Company on thirty retail service stations, I believe, fifteen of which were company owned and operated, (T. 511) fifteen lessee dealers and which was done at the request of Senator Coolihan.

Q. Were the results ever conveyed to Senator Coolihan? A. I specifically assigned Mrs. Bates to the project of conducting the audit and upon completion sitting down with the Senator and reviewing its contents with the auditor of Finance.

Q. And how many Exxon stations were in fact audited? A. I believe if my memory is correct thirty.

Q. And what did they show? A. They showed that in comparing, I believe, the– of a three month period in '73 with a three month period in '72 that Exxon had fairly allocated petroleum or gasoline to those retail stations based on their formula, but I think there was one error which we considered human error involved in the thirty stations.

Q. Mr. Coleman, was the study and reports to the Governor that has been previously identified by yourself and introduced into evidence, were they prepared or designed in any way to support any pending legislation? A. No, to my knowledge I knew of no legislation pending at the time of the Governor's request for a survey.

Q. Mr. Coleman–

(Court) Just a minute. You say it was fairly (T.512) allocated. What do you mean fairly? A. Based on Exxon, Your Honor, having established a allocation program to fairly allocate gasoline to all levels of their retail trade, company owned and operated and lessee dealers. Many of the oil companies went into this type program before the Federal Government went into action and demanded a fair or equitable program of allocation. I vividly recall

Getty Oil also instituted a allocation program based on throughput and prior history of both commercial customers and retail and in the Getty case they also made a human error in their concept in that many of the farmers in Maryland were having shortages of gasoline and requested specific help from our office; and we determined with Getty's assistance also that the formula was based on the winter months which penalized the farmer in the summer months; and Getty promptly revised their computer program to improve the farmers' condition in Maryland.

(Court) All right, sir.

Q. Mr. Coleman, in the pretrial order it's stipulated that you were requested to draft a bill to correct certain alleged inequities reflected in these reports we've been speaking about and that have been introduced into evidence. Did you in fact draft such a bill? A. I did.

(T. 513) Q. For whom? A. For the Comptroller, Louis L. Goldstein.

Q. I ask you to review that document, sir. A. This appears to be the original draft that I presented the Comptroller.

Q. To the best of your knowledge, Mr. Coleman, after you submitted that draft of a bill to the Comptroller, do you have any idea what the Comptroller did with it? A. I'm sure–I'm positive the Comptroller sent it over to the Governor for consideration and introduction in the next General Assembly.

Q. I ask you to look at a letter and see if you can identify that letter and if you've seen it before. A. Yes, this is a letter from the Comptroller, Louis L. Goldstein, to Honorable Marvin Mandel, Governor of Maryland, dated January 7th whereby he is conveying two bills which he would like to have introduced in the session–this session of the General Assembly.

(Mr. Woodstock) Your Honor, I'd like to proffer the letter to the Governor from the Comptroller and the draft of the original bill which Mr. Coleman has testified to.

(Court) All right, sir.

(Draft filed herewith as evidence as State's [Defendents'] Exhibit #F)

(T. 514) (Letter filed herewith as evidence as State's [Defendants'] Exhibit #G)

Q. Mr. Coleman, to the best of your knowledge and information, was there in fact bills introduced in the '74 session of the Legislature which were similar to the bill you, had drafted and gave to the Comptroller? A. That is correct.

Q. Could you identify those bills? A. Yes, I can.

Q. Would you please do so? A. Senate Bill 465 was introduced by Senator Pine and is a copy of the bill or the original bill that I submitted to the Comptroller. House Bill 918 issued at a later date by Delegate Bonvegna is a mere image of Senate Bill 465.

(Mr. Woodstock) Your Honor, we'd like to offer Senate Bill 465 as Defendants' Exhibit H and House Bill 918 as Defendants' Exhibit #I.

(Court) All right, sir.

(Senate bill 465 filed herewith as evidence as State's [Defendants'] Exhibit #H)

(house bill 918 filed herewith as evidence as State's [Defendants'] Exhibit #I).

Q. Mr. Coleman, did you appear and testify on either of these bills? (T. 515) A. No, I did not.

Q. To the best of your knowledge did anyone from your office appear and testify on these bills? A. None from the Gasoline Tax Division. Comptroller Louis L. Goldstein testified.

Q. To your own personal knowledge did he present to the respective committees of the Legislature that he appeared and testified before on these bills copies of the reports and analysis that have previously been submitted into evidence? A. He did provide committee members the benefit of those analysis reports.

Q. Mr. Coleman, who within the Comptroller's office will be enforcing Chapter 854 of the Laws of Maryland of 1974 if it is upheld? A. I would assume the Gasoline Tax Division since it is an amendment to the body of the Motor Fuel Inspection Act.

* * *

(T. 517) OCTOBER 17, 1975

(Court) All right, Mr. Woodstock.

(Mr. Woodstock) Mr. Coleman.

DIRECT EXAMINATION (Continued)

By Mr. Woodstock:

Q. I believe we left off yesterday I had just asked you if you were familiar with the terms of and provisions of Chapter 854 of the Laws of Maryland of 1974; and I don't recall whether or not you responded to that question so for purposes of the record I'm going to repeat the question and ask you to respond. A. Yes, I am.

Q. Would you please give the court your understanding of the following terms as they are used in the Act, number one, producer or refiner. A. Producer or refiner in my opinion would include any person, firm, corporation, company that would engage in the practice of producing, refining, compounding and blending motor vehicle fuel.

Q. Major brand? A. Major brand would be gasoline marketed by a major oil company in numerous states with an extensive advertising program, advertising that brand or trademark.

Q. Any other characteristics of the major brand? A. Many cases that would involve credit cards, avail- (T. 518) ability to preferred customers and would be tied in to producing-refining.

Q. Secondary brands? A. Secondary brands would be a brand marketed by a major oil company under a brand other than their national advertised brand. We have several in the state. In the State of Maryland they appear to be mostly gas and go type stations offering no repair services.

Q. Unbranded retail service station? A. Unbranded retail service stations in Maryland would be those individuals that do not have any tie into any producer-refiner per se. They may obtain their gasoline from numerous major oil companies, market it under their own trademark. Normally these would not have credit cards available for their customers.

Q. Wholesalers? A. Wholesalers as defined in the Act refers to those motor fuel dealers that are registered under Section 135 of Article 56 of the Annotated Code. The definition of a motor fuel dealer is broken down into three categories, the first category would be any individual importing gasoline into the State of Maryland and making the first sale would be required to be licensed by our office, month – and file monthly reports and remit the tax. The second provision would pertain to any (T. 519) body importing gasoline into Maryland which not–has not had the Maryland tax applied to it and using that gasoline in its business. This would be termed a dealer-user. At present we have, I believe, six dealer-users in our files which are mainly taxi-cab companies which are obtaining gasoline in Virginia, importing it into Maryland and thereby are required to pay the tax. The third condition applies to those individuals that are producing, refining, compounding, blending, distilling motor gasoline in the State of

Maryland. We have presently twenty major oil companies registered as compounders as of June 1, 1975. These twenty companies have enjoyed compounding permission since 1961. Now they enjoyed it prior to that, but we had other individuals that were not engaging in these practices that I eliminated from the file down to twenty major oil companies in 1961.

Q. Retail service station dealers? A. Retail service station dealers are defined as those individuals operating a business that engages in the practice of dispensing motor vehicle fuels in the tanks of motor vehicles.

Q. Retail service station? A. That place of business engaging in the practice of making and offering and selling gasolines and motor vehicle fuels into the tanks of vehicles.

(T. 520) Q. And as used in Paragraph F of the Act apportion uniformly? A. Apportion uniformly would apply to allocation of motor vehicle fuels in a uniform manner based on establishing a formula of previous history of a service station on its throughput and its growth and what fuel is available to meet that formula; and all retail dealers supplied by a major company or oil company would uniformly distribute whatever gasoline is available proportionately and equally to all of its customers.

Q. Mr. Coleman, has the Gasoline Tax Division of the Comptroller's office promulgated any rules and regulations specifically pertaining to any of the sections of this Act? A. We have promulgated regulations pertaining to the orderly manner of divestiture under Sections B and C for the two periods.

Q. Sir, I ask you to look at that document and identify it for the court. A. This is a publication in the Maryland Register establishing the fact that we are holding public hearings and are promulgating regulations to establish a procedure for divestiture under the two provisions of the Act.

(Mr. Woodstock) Your Honor, we would offer this into evidence and point out that it's an exact copy right out of the Maryland Register.

(T. 521) (Court) All right, sir.

(Publication from Maryland Register filed herewith as evidence as State's [Defendants'] Exhibit #J)

Q. Mr. Coleman, have any additional guidelines, rules or regulations been promulgated pursuant to the Gasoline Tax Division's administration of this Act? A. We have not promulgated any other rules or guidelines under this Act at this time.

Q. Is there any specifc reason for not having done so? A. We didn't carry it any further due to the litigation of this case. It was impossible and we had no reason or right to expect the major oil companies to come in and participate in development of rules and regulations and guidelines.

This is the normal thing we do with the industry. We normally meet with them and discuss the things before finalizing them.

Q. Assume, if you will, that the remaining provisions of Chapter 854 are upheld, what would be the procedure utilized by the Gasoline Tax Division in implementing the provisions of this Act? A. I'm sure that we would immediately request the presence of the major oil companies doing business in the State of Maryland to meet in the process of promulgating any (T. 522) future regulations and guidelines in following the Act.

Q. Mr. Coleman, as Chief of the Gasoline Tax Division, your division will be charged with enforcing and administering the provisions of this law, is it your opinion that you are prepared to enforce the provisions of that Act? A. I believe we are prepared.

(Mr. Woodstock) No further questions, Your Honor.

CROSS EXAMINATION

By Mr. Noonberg:

Q. Mr. Coleman, I have a few questions if I might. I believe you testified that you drafted the bill that ultimately became Chapter 854, is that correct? A. That's correct.

Q. In connection with your drafting of the bill, you did not consult any outside economist to determine the economic impact of that—of those provisions, did you? A. That is correct, I did not.

Q. Indeed, sir, in drafting the bill you did not seek any outside expert advice concerning economic impact or competitive impact, is that correct? A. That is correct.

Q. Mr. Coleman, I have Exhibit A which is the letter of June 13, 1973 from Governor Mandel to Mr. Goldstein and I also have the June 29, 1973 letter which is Exhibit B and these letters state and I will read to you exactly "Specifically (T. 523) I would like to know whether company owned and operated filling stations are being given larger quotas of gasoline than privately operated and independent filling stations;" and from Exhibit B we have the statement "The enclosed questionnaire is designed to determine whether company owned and operated service stations are being given larger quotas of gasoline than privately operated independent service stations." Now I believe that you testified on direct examination that based upon the evidence that you had from the surveys that you found no evidence that any of the Plaintiffs in this case were misallocating gasoline supplies during the period 1973, is that correct? A. That is correct.

Q. And indeed during the period 1973 you—your office conducted, I believe, you testified two independent audits, one of Exxon stations and one of Getty stations and that as a result of those investigations you

found affirmatively that both Exxon and Getty were indeed allocating in a fair and equitable manner as between their company stations and dealer stations, isn't that correct? A. We performed the Exxon audit on thirty stations, not the entire universe of Exxon stations in Maryland; and that did indicate on those thirty Exxon was properly apportioning motor vehicle gasoline to retail stations, both (T. 524) company owned and leased dealer. In the Getty, we did not perform an audit. I didn't mean to allude to the fact we performed an audit. We did discuss Getty's problem with their allocation with them; and they were quick to realize that the formula was out of tilt in that you don't allocate to a farmer based on what he received in January, February and March because the bulk of his activity is in the summer months.

Q. As soon– A. Based–what knowledge we have of Getty they were properly allocating at that time.

Q. And as soon as you brought that seasonal problem to their attention, they corrected that? A. That is correct.

Q. So that it is fair to say, is it not, that the–as a result of your survey and in response to the question that you–that is contained in the first page of Exhibit B concerning fair allocation as between company operated and noncompany operated stores that you found no evidence of misallocation? A. On the allocation knowledge we performed, that is correct.

Q. You were also aware, are you not, sir, that as of January 15, 1974 the Federal Emergency Petroleum Allocation Act went into effect and that the Plaintiffs in this case and (T. 525) all of the other oil companies are controlled in their allocation practices by federal law, isn't that correct? A. That is correct.

Q. I believe you testified at you deposition that so far as you were aware there was no relationship between the

survey which is–was conducted and about which you testified on direct examination and Paragraphs B and C of Chapter 854, is that correct? A. I'm–

(Mr. Woodstock) Objection, Your Honor. What Mr. Coleman testified as to what the connection, if any, between the survey presented to the Legislature and the Legislature's ultimate enacting of the Act is kind of irrelevant because Mr. Coleman has not knowledge of what the legislators–what was in the legislators' minds.

(Court) How about that?

(Mr. Noonberg) If Your Honor please, I think that Mr. Woodstock's comments do not have any relationship to my question. My question was whether or not Mr. Coleman as chief administrator of the Gasoline Tax Division and the person who has just testified that he would be required to enforce the Act and is prepared to enforce the Act, whether or not he knows of the relationship between Paragraphs B and C of the Act and the survey information which was prepared.

(T. 526) (Court) All right, stated that way, I'll let him answer it.

Q. You may answer the question. A. Would you repeat it again?

Q. Yes, sir. A. At this point confused–

Q. Surely. I believe that I'm accurate when I suggest to you that in your deposition I asked you the question of whether or not there was any relationship between Paragraphs B and C of the Act and the survey results which you received as a result of the surveys which you conducted and I believe that you responded by saying so far as you were aware there was none, that you did not know of any; and I ask you that question again. A. Well, my answer would have to be the same naturally.

* * *

(T. 529) Q. And is it not correct, sir, that when you defined what a retail service station was you simply

eliminated the dealer and used the words out of 1 5 7 (a) making it a place instead of a person? A. I'm not sure I did it in that context but I described the retail service station as the place of business, that would pretty much be the wording in the law, that is correct.

Q. By the law you mean 157 (a), do you not? A. That is correct.

Q. All right. Ordinarily in the–what we'll call the jargon of the industry, Mr. Coleman, that is the petroleum industry, wouldn't you agree that stations like Scot, the Ashland chain in Maryland that were described in court, Kayo as described by Mr. Chandler, are not retail service stations because they give no service, but are merely gasoline stations? A. In 1969 I drafted the Motor Fuel Inspection Act after (T. 530) reviewing the motor fuel inspection laws of numerous states. The definition of a retail service station dealer was established embracing the definition of the place of business for the simple reason it had to be broad to cover marinas and all other facets of marketing that the petroleum industry engages in. We couldn't specifically spell out a service station having two bays as being the station and let a marina with a pump on the dock and one on the shore servicing automobiles escape the normal sampling and inspection purposes. The theory of the law was to protect the consumer and that he is getting quality petroleum products no matter where they're being dispensed from. The marketing practices of the major oil companies can change tomorrow with a car wash, a total wash, we couldn't keep repealing the Act and amending the Act to embrace all of the various facets that the industry may come up with so this was the nature and reason for the broad terminology.

* * *

(T. 531) Q. All right, sir, now when you define producer and refiner, I think I am correct that you then said any person that producing or refining, compounding or blending motor fuel, is that essentially what you said? A. Yes, sir, that is what I said.

Q. Beg your pardon? A. Correct.

Q. I note that in that instance, however, you left out the last three words of section 7 of 1 5 7 (a), those (T. 532) last three words being "in this State." Are they not? A. Section 7 of Section 1–Subsection 7 of Section 157(a) defines a manufacturer and refiner.

Q. Um hmm. A. Shall mean and include any person, firm or corporation engaged in producing, blending or compounding motor vehicle fuel in this State. I didn't, as I recall, define a manufacturer and refiner. I defined a producer-refiner as set forth in the Act. The manufacturer to us and in my opinion is the same as a producer. It is old terminology, it goes back to the early Twenties if you look in Section 135 as to the definition of a motor fuel dealer, the term is also used there. Presently, as I recall, there is one company advertising that they are a manufacturer of petroleum products; and in this law or definition it says in this State and Section 135 it says in this State also; and I did say we have twenty compounders registered under 135; and we also consider blending, if I may, essential and would classify anybody blending gasolines as a compounder administratively.

Q. I see. A.This is when you co-mingle Ashland and Connoco product in the same type, which while Connoco has a compounder's license, they might be in violation of Article-the fraud statute on rebranding.

(T.533) Q. Mr. Coleman, as I understand it, you're telling us that 157(a) the definition of manufacturer and refiner as you understand it does apply to 157(e), which is

Chapter 854, is that correct? A. I say that the term refiner – manufacturer-refiner is the same –

Q. I didn't ask you that. A. –as producer-refiner.

Q. I didn't ask you that. I'm talking about interpreting what this statute means. 157(a) is a series of definitions. A. That's correct.

Q. Do those definitions apply to 157(e), the statute under consideration in this court? A. I would say they would.

Q. You would say they would and I think you also said a moment ago that the word to you manufacturer is synonomous with the word producer– A. That's correct.

Q. –in this industry, is that right? A. That is correct.

* * *

(T.539) Q. Thank you. As you originally drafted this legislation, Mr. Coleman, did you not include the class wholesalers within the statute? A. My original draft included wholesalers and producer-refiners, that is correct.

Q. Why did you include wholesalers in the proscription along with producers and refiners? A. Well, it was my intention to include producers, refiners and wholesalers carte blanche, not to discriminate against one class as to another. It was up to the General Assembly to make that decision. Apparently the wholesalers were represented at the testimony in the hearings. At that time they were testifying I was not in the room. I did hear at a later date that they wanted to be exempt from it because some of the wholesalers being local jobbers had no investment or financial activity or engagement with the producer-refiner so they wanted to plea upon the mercy of the committee so to speak and amend themselves out and let the law apply to those that were entirely the producers and refiners.

(T.540) Q. Nevertheless, based on your surveys and your reports you felt that it was appropriate to include wholesalers along with producers and refiners? A. Very definitely because the wholesaler as defined in that particular subtitle which ties back to Section 135 which covers all motor fuel dealers whether they are a legitimate wholesaler in the jargon or they are producer-refiner manufacturer-compounder and blender. Most of these individuals, I might add, are not engaged in the practice of compounding and blending. They do not have that permission and have not since '61.

Q. There are wholesalers in Maryland, are there not, who operate retail service stations? A. There very definitely are.

Q. And some of the stations they operate are company operated and some are dealer operated, is that correct? A. Well, if you mean, for an example, Joseph Smith is a wholesaler, he may operate some of his stations and the stations that Joseph Smith owns and he may lease some of them out, that is correct. He can go both ways, simple as that.

Q. You have no information then as to why the Legislature of Maryland chose to make that discrimination? A.Not other than hearsay as to the general data that (T.541) these men were local businessmen, had no definite tie in with the refinery, based on their–that's to me is hearsay but that's what I heard and I think I testified to that before.

* * *

(T. 542) CROSS EXAMINATION

By Mr. Greenwald:

(T. 543) Q. Mr. Coleman, during the course of your examination you used the words engaged in compounding and blending and so forth a number of times; and those words appear in Section 157(a) in the definitions of manufacturer and refiner, is that correct? A. Pardon me? Would you repeat that? I recall the part using the word engaged in compounding and blending, the last part of the question I missed.

Q. All right, those words engaged in appear in Section 157(a) of the Motor Fuel Inspections Laws, is that correct? A. Yes, they do, in the definition of a manufacturer-refiner, compounding and blending.

Q. Now by using the term engaged in, you're referring to a regular or frequent practice? A. That is correct.

Q. All right, you are not referring to an incidental or occasional practice? A. That is correct. In fact in our analysis also after '73 when we volunteered the Truth in Advertising Act, this dealt with exchanges, exchange agreements. In '73 I think the major oil companies operating in this state, the majority of them, not all of them, increased their exchange activity beyond any proportion of the past or the future. I mean the past, say '70 or '71, so there was every reason to believe (T. 544) the exchanges that were filed with our office under that section of the law indicated that these companies were engaging in the practice of exchanging; and it was meeting the specifications of the inspection law but it was an active practice.

CROSS EXAMINATION

By Mr. Simon:

Q. Mr. Coleman, is it true that the statute has no application to a producer-refiner who sells gasoline in

Maryland in the same form which the gasoline crosses the state line? A. No, I wouldn't necessarily say that it's in my opinion, correct. If he produces and refines and imports it into Maryland, I would say that he would be covered under the producer-refiner provisions of the Act.

Q. But does– A. Whether he compounds or blends it.

Q. But isn't the Act limited to one who produces, refines, compounds or blends in Maryland? A. I would say anyone producing, refining, compounding or blending would be covered. It does say in Maryland, right.

* * * *

(T. 545) (Court) Anyone else? Mr. Coleman, I'd like to ask a few questions.

(T. 546) REDIRECT EXAMINATION

By Mr. Woodstock:

Q. Mr. Coleman, in your opinion would the provisions of Chapter 854 apply to the Plaintiffs in this litigation? A. Based on my knowledge of the practices they have engaged in in the past and in the current period, yes.

Q. Do you know if any of these companies have oil wells in the State of Maryland? A. There are no oil wells to my knowledge in the State of Maryland.

Q. Do any of these companies to your knowledge have refining ability, capabilities or actual refineries themselves in the State of Maryland? A. There are no refineries in Maryland producing motor vehicle fuel. The last one was probably Esso and I think they shut down that–

* * *

(T.547) Q. Mr. Coleman, to the best of your knowledge does the term manufacturer-refiner appear anywhere within the provisions of Chapter 854? A. Manufacturer-refiner?

Q. Pro—yes, manufacturer-refiner. A. It does not appear in the Senate bill that was introduced.

Q. How about as the law as enacted? Rather the Act in question in this litigation? A. The Act that was or the bill that was enacted does not include manufacturer-refiner.

Q. What's the word? A. It's producer-refiner that was put in.

(T. 548) Q. What is your understanding or definition of what constitutes producer? Just producer? A. Just producing motor vehicle fuel regardless of manner or method.

Q. How does one—as you knowledge of the petroleum industry, how does on go about producing motor fuel? Do they have to produce something else first? A. They would have to go through a refining process of crude oil to produce motor vehicle fuel.

Q. Does the word produce refer to the crude or does it refer to the gasoline? A. I would assume it refers to both producing the crude and producing the gasoline.

Q. And what was your definition of refiner? A. Refiner is to own and operate a refinery that is capable of producing motor vehicle fuel.

Q. Do the words to the best of your knowledge—do the words in this state any where appear in the provisions of Chapter 854 of the Laws of Maryland? A. They do not appear.

* * *

(T. 549) RECROSS EXAMINATION

By Mr. Preston:

Q. Mr. Coleman, you said that no Plaintiff in this case produces, whatever that means, motor vehicle fuel in the State of Marylamd, you know that as a fact, do you not? A. That's correct.

Q. And no Plaintiff in this case manufactures, whatever your definition of that is, motor vehicle fuel in the State of Maryland? A. Well, I wouldn't include manufacturing. Manufacturing could be the blending, compounding.

Q. All right, sir. A. Of premium and regular and that has been done.

Q. Let me limit this to my clients, Continental and Kayo, since I'm not familiar with all the others. If the Continental Oil Company brings motor vehicle fuel into this state and stores it at its Maryland terminal after it was refined somewhere else and it's moved here through the Colonial Pipeline into the Continental Oil Company terminal and nothing is done to that motor vehicle fuel in the way of mixing it with anything else at that terminal except to pump it into trucks where it's taken either to Kayo stations or to other persons, firms or corporations to whom Continental might sell that gasoline, then you wouldn't say that (T. 550) they are either manufacturing, compounding or blending motor vehicle fuel here, would you? A. Under that illustration I would say that is correct, but in fact I think there is—

Q. I've just given a—I'm going to go on from that illustration in a moment. Now you mentioned the fact that if they had an exchange agreement with the Ashland Oil Company they might be blending or compounding motor vehicle fuel in the state. A. That is correct.

Q. But I think you also said that if the gasoline that they were storing in their terminal here was fungible as between whatever they delivered to Ashland and whatever they delivered to Kayo or anyone else then they wouldn't be blending or compounding. A. Well, I don't know that I said blending there. It might be possible of blending, but not compounding definitely.

Q. There might be a possibility of blending? A. It depends on how the product was refined and if it was under the specifications of fungibility, I might add that the law requires Continental and all the Plaintiffs and every major oil company in this state to file their specifications with our office. I don't know of anybody that (T. 551) has filed its specs and says it's fungible. We are aware there are fungible shipments in the pipeline and there are segregated shipments in the pipeline.

Q. Well, if the–first of all, to make clear what the exchange agreement is with Ashland without getting into any specific terms, it doesn't mean that any gas, gasoline is changed in Baltimore, does it, but rather that Ashland has exchanged by delivering to Continental some place else some quantity of gasoline. A. There's always an offset in the exchange agreement.

Q. And here in Baltimore at the Continental terminal some of the gas that Continental has here they exchange or give to Ashland, isn't that correct? A. That is correct.

Q. Well, are you telling us that blending–if Continental does absolutely nothing to that gas whatsoever except to put it in a tank here in Baltimore, that the word blending would mean that they have blended the gasoline here? A. I said if it all came out from Continental's refinery and it was blended with the same specs. Continental's specs and Ashland's were identical, that would not constitute blending or compounding, but I believe there is a tank in the confines of the plant in Baltimore that has unleaded gasoline in it. That comes from other suppliers (T. 552) other than Connoco. So blending can be taking place in their plant; and I can't testify to the fact that it isn't taking place.

Q. All right, you're not testifying one way or the other. You say it can be taking place. A. If all of the

gasoline that went into that plant in your illustration were manufactured at your refinery, then Ashland can't be engaged in blending. The mere co-mingling under an exchange meets the requirements of a terminal agreement, then it would not constitute blending or compounding.

Q. On behalf of Continental or Ashland? A. That's right. That is correct.

(Mr. Preston) Okay. Thank you very much.

(Court) Anyone else? Mr. Coleman, I understood you to testify that you were the author of this bill and it was based upon the results of the survey of these various organizations that you sent out, is that correct? A.That is correct, sir.

(Court) And as a result of the survey you felt it was necessary to draft this proposed Act? A. No, sir, I didn't testify I felt it was necessary to draft the Act. The survey was mailed to all of the retail service station dealers and a separate one to the major oil companies to try to seek information for the Governor. We (T. 553) received statements back indicating various things. We did not have the time or manpower or the ability to spend endless hours to investigate the true facts of this portrayal in the survey. We presented the results of the survey as it was submitted to us. We prepared an analysis based on what the retail service station dealers said, what the major oil companies–

(Court) You presented it to the Governor? A. –and I presented this to the Comptroller.

(Court) Oh, to the Governor. A. No, the Comptroller.

(Court) Comptroller. A. Comptroller Louis L. Goldstein. He felt it important enough to draft legislation to present to the General Assembly for their consideration.

(Court) So it was Mr. Goldstein's decision rather than

your own? A. That is correct. He directed me to draft the bill.

(Court) And he said to draft the bill? A. That's correct.

(Court) Now is it your general duty in performing your function as Chief of the Division to draft legislation? A. It is the normal practice where we find problems (T. 554) in our existing laws for me to draft a bill which is normally submitted to the Attorney General's office for perusal for legal sufficiency and constitutionality.

(Court) Are you—do you have any past practices in drafting legislation? A. My twenty-six years in the Gasoline Tax Division, yes, sir, I have.

(Court) All right. Could you tell me what assistance you received from any outside source in— A. In drafting the bill, sir?

(Court)Yes. A. I received none, only my staff.

(Court) I see. A. Existing staff.

(Court) All right, thank you. That's all I wanted to know. Any other questions?

* * *

(T. 556) (Mr. Woodstock) If it please the court, before the recess I had indicated to the court I wished to proffer certain documents.

(Court) All right, sir.

(Mr. Woodstock) During recess they have been inspected by the Plaintiffs and if they don't have any objections, I'd like to proffer them and identify them.

(Mr. Noonberg) We would object, Your Honor, to the admissibility of these documents for the same reasons that we raised before. We think they're clearly hearsay and cannot be admitted for the truth of what's contained in them. We do not object to the fact that they're admitted for the limited purpose of showing that certain documents were in fact presented to the Legislature.

(Court) What are they, Mr. Woodstock?

(Mr. Woodstock) These are statements, two statements by Exxon officials, one before the Senate committee considering SB 465, and House committee considering 918, statement by Shell Oil Company to the House committee and statement by executive director of the Greater Washington (T. 557) Maryland Service Station Association to the Senate committee; and these are the only written statements available from the committee files in considering this bill was eventually—became Chapter 854; and I'm offering not for the truth but for the fact that these people did testify and that they did leave these statements and that possibly the legislators—Legislature had this before them in consideration.

(Court) All right, I'll admit them for that purpose.

(Statements filed herewith as evidence as State's [Defendants'] Exhibiit #K(l-4))

* * *

(T. 558) ARTHUR E. PRICE,

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) State your full name and address.

(Witness) Arthur E. Price, 1807 Angleside Drive, Fallston, Maryland.

DIRECT EXAMINATION

By Mr. Cordi:

Q. Mr. Price, what is your present position? A. I'm chief of motor fuel inspection for the Gasoline Tax Division of the Comptroller's office, State of Maryland.

Q. How long have you held that position? A. Since September 30, 1970.

Q. To whom do you report? A. Mr. John K. Coleman.

Q. And as chief of motor fuel inspection, what are

your responsibilities? A. To enforce the sections of the motor—commonly referred to as the Motor Fuel Inspection Laws, Section 157 (a through u) of Article 56.

Q. Would you give the court a brief description of your experience prior to becoming chief of motor fuel inspection? A. Simply stated upon graduation from high school in Baltimore, I went to work with the fluid heat division of Anchor Post Products which was a manufacturer of oil burners, (T. 559) boilers and furnaces. I spent ten years with them in positions, design draftsman, laboratory technician, manager sales order department, salesman and ultimately district sales manager. I left Anchor Post Products in 1957 and went to work for Cities Service Oil Company, now known as Citgo, and started there on a cadet program that led me through a six-month training program as to their activities. I served in a retail service station, I managed a retail service station. I became a dealer sales representative. I was promoted to district sales manager. I served as a commercial consumer sales representative and the final four and a half years of which I was regional retail marketing manager in charge of all direct operations, retail operations, from the New York State line to the North Carolina line.

* * * * * * *

(T. 559) Q. It's been stipulated to in the pretrial order that you prepared the retail service station dealer questionnaire (T. 560) previously identified by Mr. Coleman. I ask you to explain to the court how was this designed. A. The questionnaire?

Q. Yes. A. The questionnaire was designed utilizing my knowledge, the best of my ability of the industry to which I had been associated so long and to attempt to encompass every facet that would have a relationship and enable it to accomplish the purpose for which it was intended.

Q. Have you had any prior experience in listing information of this type? A. Yes, with the oil company and it was a constant job in the final four and a half years; and it ranged in evaluating real estate for the purposes of service station construction, in the analysis and questionnaire, designed grand openings for service stations and eliciting and soliciting credit cards, credit card issuance and all other facets as it pertained to oil company retail service station activity.

Q. It's also been stipulated to in the pretrial order that over fourteen hundred and seven responses to the more than four thousand questionnaires sent out were received. Was a follow-up made to— A. No, sir, there was no follow-up made.

Q. Why was this not done? (T. 561) A. There just was not time. As a matter of fact, we held the total returns as long as we could in order to give what we thought was a maximum amount of time for the Governor—to respond to the Governor's letter.

Q. What was your responsibility with respect to the return questionnaire? A. I had the total responsibility for the return of the questionnaires from the standpoint of utilizing my staff and accounting for them, designing the work sheets, the staff sheets, the accountability of them and the ultimate—and ultimately the analysis of them.

Q. You prepared the results and analysis of the retail service station dealer questionnaires. Was there any information in this report which was not derived from the questionnaires? A. Yes, sir, there was information—additional information utilized in the analysis that over and above the questionnaires that were returned and that information would be information received from the field investigations that we made, from telephone calls received from dealers and other individuals, personal obser-

vations, comments to me by members of my staff as they travelled during that period of time the survey was underway.

Q. Did the results and analysis of the retail service (T. 562) station dealers questionnaire reach any conclusion with respect to the principal question asked by the Governor, that is, whether the shortage was real or contrived? A. No, sir, we simply stated the facts that we had obtained and that we accepted in good faith from the response. We added to that the other knowledge that we gathered by means that I just mentioned and then put our analysis together.

Q. You were unable to reach a conclusion as to that point? A. Yes, sir, we didn't feel that was our obligation to reach the conclusion. That was the conclusion to be reached by the requestor.

Q. With respect to the major oil company questionnaire which has been previously identified as Exhibit No. C, I believe, would you explain to the court how that was designed? A. In the same fashion in applying to my judgment and ability all of the facts and questions that would elicit the information in total. Both of these questionnaires were reviewed with the chief of the division; and with the assistant chief auditor who is now chief auditor of our division and one staff member prior to its actual implementation; and I think one or two minor modifications may have been made before it was produced and then it was produced.

Q. What was done with the major oil company questionnaires? (T. 563) A. It was mailed to the major oil companies of record.

Q. Did you receive replies from all the persons to whom you sent the questionnaire? A. No, sir, I believe we received replies from either nine or eleven. We did

receive requests for an extension of time, it would be late; and some were late and some didn't reply even though they requested an extension.

Q. Was a follow-up done to try and secure responses from those who did not reply? A. No, sir.

Q. The questionnaire itself was dated July 17, 1973, and I note that it specifies it must be returned by July 31, 1973. What was the reason for that relatively short period of time? A. Well, we had a target date that we wanted our analysis finished by mid or not later than the end of August in order to fulfill the Governor's request. It wasn't one that we could hold on to for six months or six years. Just a judgment factor when it would be finalized.

Q. Would you please explain to the court how the analysis of major oil companies questionnaire previously identified as part of Ex–of Defendants' Exhibit No. E was prepared? (T. 564) A. The analysis was prepared by Mr. Coleman and myself. Mr. Coleman prepared the bulk of the analysis. I assisted him. It was prepared by reviewing each of those nine or eleven questionnaires that we had and analyzing the information thereon.

Q. And did this analysis also reach any conclusion as to whether or not the shortage was real or contrived? A. No, sir, we didn't attempt to reach any conclusion. We attempted to gather information and submit it as requested for whatever use the Governor wanted it for.

Q. Why was not the analysis of the two sets of questionnaires done together? A. We attempted to do this and due to the time element of the late response by the major oil companies, we decided to do them individually since we were approaching our deadline per se; and hence they got done separately.

Q. Mr. Coleman previously testified that it was he who

prepared the initial draft of what ultimately became Chapter 854 of the Laws of Maryland 1974. Did you participate in this process? A. No, sir.

Q. Did you testify on either Senate Bill 465 or House Bill 918 which have been identified as Exhibits, Defendants' Exhibit No. H and I, while they were before the Legislature? (T. 565) A. No, sir, I did not. I was on assignment to the Energy Policy Office at the time.

Q. You testified that you're responsible for administering the Motor Fuel Inspection Law. Assuming that Sections B and C of the Act in question here are ultimately upheld, will you be responsible for its enforcement? A. I would assume that I would, sir, because it is within that section commonly referred to as the Motor Fuel Insp ction Law, that is, 157 (a through u) and would be our responsibility and our program.

Q. Are you familiar with the provisions of Chapter 854? A. Yes, sir, I am.

Q. Are you prepared to enforce the law? A. I think we're sufficiently prepared to enforce the law, yes, sir.

(Mr. Cordi) No further questions.

CROSS EXAMINATION

By Mr. Noonberg:

Q. Just a couple of questions, Mr. Price. Is there anything in either the service station dealer survey or the major oil company survey which leads you to the conclusion that there is some relationship between company operated stations and a detriment to the public welfare? A. No, sir.

* * * * * *

(T. 566) JAMES M. PATTERSON,

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) State your name and address.

(Witness) James M. Patterson, 2431 North Dun Street, Bloomington, Indiana 47401.

DIRECT EXAMINATION

By Mr. Woodstock:

Q. Dr. Patterson, what is your present occupation? (T. 567) A. I am professor of marketing and chairman of the Department of Marketing in the Graduate School of Business at Indiana University in Bloomington and Indianapolis.

Q. Doctor, how long have you held that position? A. Three years as chairman, four or five years as professor.

Q. Would you briefly describe for the court what that position entails, the duties and the responsibilities? A. Well, the professor role involves teaching classes in marketing management and marketing strategy and the public policy towards marketing. The chairmanship involves the administration of the Marketing Department, personnel matters, curriculum matters, these types of things.

Q. Will you please give the court a brief description of your eduational background indicating what degrees you hold, from where they were obtained and when? A. I attended the United States Merchant Marine Academy at King's Point and received a Bachelor of Science degree in marine transportation; and I attended Cornell University and received the MBA in—the B.S. was '48, MBA was 1954 and then I continued at Cornell for the PhD and received that in '61.

Q. Can you please give the court a brief description of any prior teaching experience you may have had? A. I had a faculty appointment at Northwestern University from '57 to '60 and then in 1960 I moved to Indiana (T. 568) University and have been there since except for a visiting appointment back at Northwestern in '67.

Q. What courses are you now presently teaching at Indiana? A. I teach a graduate course in marketing management.

Q. And basically what's involved in that course? A. The development of marketing strategies and marketing policies from the corporate firm's point of view.

Q. Dr. Patterson, have you ever undertaken any research in the area of petroleum? A. I have. In 1969 Professor Fred Allvine, who was at Northwestern, and I began a study of competition in the gasoline industry and that ultimately led to a book called COMPETITION LIMITED, was published, I believe, in '72 and then again Professor Allvine and I collaborated on a study of the gasoline crisis in '72, 3 and 4 and that resulted in a book called HIGHWAY ROBBERY, which was published in '74.

Q. Have you published any other books or papers regarding the petroleum industry? A. Well, I have published a paper, I guess it's not yet published since it hasn't come out, I've given a paper which is to be in a book published by the University of Vancouver or Victoria in British Columbia and I have formed an article with Professor Allvine and it appeared in BUSINESS (T. 569) HORIZONS.

Q. Are you currently working on any other books or papers? A. I'm in the process of trying to put in final form a paper on the effects of the structural changes in the petroleum industry on the marketing practices of the

firms in the industry and that hopefully will result in a paper to be delivered at a conference and ultimately published in November of this year.

Q. Have you ever published any other books or papers outside of the petroleum industry but dealing with economics or competition? A. Well, I have – I'm the co-author of a textbook in marketing and I have published a couple of articles on conglomerate diversification that involved matters of this sort. I have written on questions of corporate responsibility and on questions of the regulation of business.

Q. Dr. Patterson, have you ever been the recipient of any honors, fellowships or awards? A. During my years at the Academy, I held a scholastic star for academic excellence. At Cornell I earned the MBA with distinction. I received a Teagle Foundation scholarship while a graduate student and my last year at Cornell I was granted a Ford Foundation dissertation scholarship.

(T. 570) Q. Dr. Patterson, have you ever appeared in court as an expert witness prior to your appearances in this case? A. Yes, sir, I've appeared in several cases involving the petroleum industry and one involving the movie industry. I beg your pardon on that. I have been involved in them and not all cases did I appear in court. The only times I've appeared in court is in connection with the oil industry.

Q. Can you give us a brief description of those cases? A. The movie case involved a private anti-trust suit against the Big Seven distributors and a couple of exhibitors in Indianapolis by an independent exhibitor. That one I was not used as a witness in court, but it ended in court. In the case of–there was a trial in St. Louis involving a zoning ordinance of the Univeristy City of Missouri and that was a case between Texas Discount Gasoline Company and the city of–University City of

Missouri to look at the constitutionality of a zoning ordinance restricting the posting of price. I was a witness in a trial in Louisville between the CSC Oil Company and several independent private brand marketers there over a below cost sales statute problem. I appeared as a witness in an injunction hearing before the District Court in Philadelphia on the Phillips and an oil company. I'm involved in a case which is supposed to come to trial within the next two weeks between Offski Oil—Offski Gasoline and (T. 571) OKC Petroleum in Minneapolis; and another case coming in December 7th or 8th in Honolulu involving Union Oil.

Q. Dr. Patterson, have you ever been requested to testify or have you testified about the tend in marketing before any legislative body or committee of either the Federal or State governments? A. I have. The most recent testimony was before the Senate's Anti-trust Subcommittee on September 23, I believe it was.

Q. What was the nature of those hearings? A. In all cases they were hearings looking at the competition and marketing practices of the oil industry.

Q. I hand you a paper and ask you if you can identify that. A. (Looks at document).

Q. Would you briefly describe to the court what's contained on those papers? A. That's a cirruculum vitae which is a few months old that I prepared to use when I have requests for vitum.

(Mr. Simon) No Objection, Your Honor.

(Mr. Woodstock) Your Honor, we'd like to introduce this as—

(Clerk) Defendants' L.

(Curriculum Vitae filed herewith as evidence at States's (T. 572) [Defendants'] Exhibit No. L)

Q. Dr. Patterson, when you testified that you've

testified before Congress, would you tell us at whose request you appeared and testified? A. I've always been invited by the Congress itself by the chairman of the subcommittee that was holding the hearing.

Q. For example, if you will, this last hearing that you've testified that you appeared and testified before for the Senate? A. Those hearings were conducted by Senator Bayh in the illness of Senator Hart; and I was invited by Senator Bayh.

Q. Were you ever paid a fee for testifying at these hearings? A. I've never been paid a fee to testify.

Q. How about expenses and travel? A. The committee for academic witnesses paid me travel and a per diem fee.

Q. Dr. Patterson, approximately when were you retained by the State of Maryland to serve as an expert witness in this case? A. I don't have the exact date of the retention. I noticed in my diary this morning that you and I had our (T. 573) first meeting on March 12th of this year.

Q. And after you were retained by the State as an expert in this case what work did you speciifically do in connection with this case? A. I have primarily reviewed documents pertaining to the case developed upon discovery and I have looked at documents in the Gasoline Tax Division of the State and I have looked at th literature with respect to the industry and have tried to understand something about the nature of competition in the State of Maryland.

Q. And in your previous books and publications that you testified to having published concerning the petroleum industry, can you tell us the viewpoints or the discipline involved in these books? A. Well, I'm not quite sure how to phrase that. The point of view is from my own discipline as a professor of marketing. I have

been taained in economics and, therefore, I am concerned to use the model of competition as the basis for evaluating the implications, arrangements and practices, but it's the practice of marketing, I think, to look at other things as well, namely, the variety being offered, the—and things of this kind as well as just plain competition, innovations, new product developments, increases in a consumer convenience, these matters to be used as criteria for judging (T. 574) the arrangement or practices being evaluated.

Q. Dr. Patterson, are you familiar with Paragraphs B and C of Chapter 854 of the Laws of Maryland of 1974? A. I've read them several times, yes.

Q. And have you formed an opinion as to how paragraphs B and C of that Act will affect competition in the retail marketing of gasoline in the State of Maryland? A. Yes, sir, I have.

Q. Sir, what is that opinion? A. In my opinion those two paragraphs will tend to enhance and to preserve intertype competition and, therefore, will increase the competitiveness of the gasoline market and will, therefore, increase the benefits that accrue to the driving public that come from increased competitive activity.

Q. You use the word intertype competition. Would you please define that for the court? A. In the gasoline industry, there tends to be several distinct types of marketers being persons referred to here during the trial the major branded marketer, the semi-major or a integrated refiner-marketer and then the non-integrated private brand marketer. In studying price and other forms of competition in this industry, one finds that competition between the major brand actors essentially results in the (T. 575) proliferation of non-price forms of competitive actions and that the sole source of price competition in the marketing of gasoline comes from the competition between types of marketers, namely, the

private brand, non-integrated marketers and the major brand marketers? and it's this intertype, between type competition that the two paragraphs of the law tend to enhance.

Q. Dr. Patterson, do you draw a distinction between the latter group you defined there and I believe you called them the independent type or the non-major competitor; and you made a distinction between non-integrated and, I believe, was it private branded—do you draw a distinction in the characteristics in which they act in the marketplace? A. I do—I think it has nothing to do with the kind of people they are, but the situations in which they find themselves. The major marketer has a heavy investment and a particular form of distribution, he is closely intertwined with his competition through exchange agreements and joint ventures. The nature of that form of competitive relationship is one which makes price competition too aggressive and in a sense self-defeating so that they would be motivated not to use price because of the structure of the market and their relationship would be by themselves. On the other hand the smaller, less committed, more flexible, non-integrated (T. 576) private brand marketer finds that the principal weapon at his disposal is price and he understands his position as being one where he's probably able to get away with cutting price, not be clobbered immediately; and the result is that he finds in his situation price — cutting the price to be a much more effective marketing instrument than either the integrated refiner-marketer who sells at a discount but who doesn't try to extend that discount and the major brand marketer who finds that his situation is such that to use the price is self-defeating as a primary marketing competitive tool.

Q. Dr. Patterson, would your opinion be the same

even to those independents who are integrated refiner-marketers as well? A. I—I've been troubled by this since the deposition and the question of whether it is true, in my opinion it is that the integrated refiner-marketers who are—who tend to market at a discount also find it in their interest not to be aggressive in price. They tend to be, if you will, passive price takers. They're not rich enough, strong enough or adequately endowed with economic rent from the crude level to justify the investment in branding and in the majors' kind of marketing, but nevertheless they are so closely interconnected with their major competitiors and with the (T. 577) that they find that aggressive price competition is not the most profitable route for them to take. They're too big, too interdependent to use price. The only marketer who can use price in this industry and is the one who thinks he can get away with it by a virtue of his independence and by virtue of his smallness and by virtue of his geographical diversity.

Q. Dr. Patterson, were you in court Wednesday when Dr. Levitt gave his testimony? A. Yes, sir, I've been here from the beginning on Wednesday.

Q. Do you recall during Dr. Levitt's testimony his discussion of the wheel of retailing theory? A. Yes, that's an idea that Professor McNair from Harvard made popular at the commencement address he gave at the University of Pittsburgh some years back, around '56 or 7. It has some currency in marketing, but there are a number of people in the field who have pointed out exceptions to it, notably Professor Stanley Hollander of Michigan State University. It's about on par say with Marxie and Ballard on materialism. It's an idea, it's kind of way of thinking about things but I think as a scientific concept it's lacking.

Q. And while you were in the court room you've heard various testimony from some of the Plaintiff oil company executives to the effect that if B and C were upheld that they (T. 578) may well cease to do business in the State of Maryland, is that correct? Do you recall—A. I heard that testimony. I heard it from, I guess, both Scot—

Q. In your expert opinion of the competitive process as it would be affected by B and C of the Maryland Act, do you think in the normal—do you have an opinion as to the form or shape and the content of the various actors that would perhaps appear in the Maryland market as part of this normal competitive evolution and the effects of B and C on them? A. I don't want to be in a position of saying that the people who testified here aren't saying what they believe they would do and there are probably some marketers who would leave. I'm not at all sure that all of those stations would completely leave the market, they would be sold, many if not most of them would be reused as service stations by other organizations, in fact it doesn't prohibit—the law—the section does not probhibit the direct operation of service stations but only the direct operations by refiner-marketers, and, therefore, nonintegrated marketers would tend to be prime customers for those stations and they would possibly appear as parts of nonintegrated chains.

Q. Dr. Patterson, do you have an opinion as an expert (T. 579) on the effects of B and C of the Maryland Act as to having any adverse effects on the development of the innovative techniques about which we've heard testimony during this trial? A. Well, I think it's with any piece of change there are costs and benefits. I have no doubt that in the sense of somebody's presentation that has been talked about by attorney from Gulf and the pretrial statement by Shell on this some of these things would to

some extent be handicapped, but it seems to me that if one looks at innovation in this industry as well as other industries one finds that the bulk of innovations seem to be coming from outside the mainstream of the way that the industry is run. For example, the discount store came from outside, the idea of the discount store came from outside; the idea of self-service in this industry has been pioneered from outside. Most of the practices that were referred to as innovations in the statements of the Plaintiff companies in the pretrial statement have been extensively demonstrated by nonintegrated marketers who—so it doesn't seem to me that it would effectively stall innovation.

Q. Dr. Patterson, have you formed an opinion of what effect, if any, Paragraphs B and C would have on retail gasoline prices in the State of Maryland? A. To the extent that intertype competition is increased, the result would be a reduction in the margins that go to the (T. 580) jobbing and retailing function. The price of gasoline unfortunately is going to be heavily determined by the cost of crude in the future; and that is largely beyond the public policy of the United States or effect at this moment and so I—the level of price is going to be heavily influenced by decisions made by OPEC. The margins, however, will be heavily influenced by the extent of competition and in my opinion those margins will be narrower by an increase in intertype competition.

Q. And, Dr. Patterson, have—during your time in court here have you heard the testimony presented by the various experts of the Plaintiffs regarding the effects of Paragraphs B and C of this Act as creating barriers to entry or potential entry for new actors in the Maryland market? A. I've heard that testimony.

Q. Have you formed an opinion as to the effects of Paragraphs B and C of said Act on the potential entry of

new competitors or new actors in the Maryland market? A. Well, it will have mixed results. I have no doubt that those witnesses testified correctly that certain actors in the system will find it unattractive to enter the Maryland market. On the other hand because the effects of these two paragraphs will tend to protect certain kinds of actors who would otherwise find it awkward to compete in this market, (T. 581) they will be induced to enter so that some will not enter, some will, I think on balance that the problem of entry is not a serious consequence of this law.

Q. Dr. Patterson, in your opinion will the divestiture and divestment provisions within B and C of the Maryland Act provide a mechanism to best accomplish this—the benefits to competition which you testified to? A. I guess I'm reluctant to call it divestiture requirements, all that it does and my understanding, Mr. Woodstock, is to restrict direct employee operations by integrated firms, refiner-producers and I'm sure if the Maryland Legislature were the United States Congress they might have chosen another route. It turns out the states trying to regulate in this direction are restricted to those activities that are in their dominion and it seems to me that it is not an unrealistic approach to try to deal with the consequences of vertical integration and all intertype competition and that it would be an effective statute to increase intertype competition. I'm not sure I answered exactly what you had in mind.

Q. Dr. Patterson, in your opinion is there any particular advantage of the public in permitting company owned and operated service stations? A. Yes, there are advantages to the public for the reasons that the witnesses the past week have indicated. There (T. 582) would be advantages to that.

Q. Do you feel that on balance the elimination of company owned and operated service stations will adversely affect overall competition in the retail market in the State of Maryland? A. I do for two reasons. The increased direct operation of service stations will first permit the immense windfall profits from the crude price increases of vertical integrated major oil companies to be focused more effectively on the price competitor; and secondly, the more direct operation of both the major oil companies and the semi-majors or refiner-marketers means that less and less gasoline is going to be coming onto the unbranded marketers and as a result the supply of the competitive gas buying situation is going to become tighter and tighter and as a result will limit his competitive activities so because of the impact on supply, on balanced integration which direct operation reflects; and because of the—based on being able to more effectively focus windfall profits on typing competitors for these reasons I think without this kind of safeguard the intertype competition will be lessened and with that tendency will be checked.

Q. Dr. Patterson, based on your research and study of the petroleum industry, will you tell the court what has historically appeared to be the most profitable level of an (T. 583) integrated oil company's operations? A. Well, until the events of the last year and a half the crude production level was most profitable and probably still is.

Q. And is this true today overall within the petroleum industry? A. Well, crude production is still extremely profitable; we have a very unnatural situation in the petroleum industry at the moment with price controls remaining, with an entitlements program and price controls on crude and with the moment margin an effectual retail price controls such as prices are below the ceilings and, therefore, don't seem to be influencing the

price, but the industry is being stifled at the moment by a government intervention.

Q. What is your overall opinion as to the effects of government controls upon—the current controls, for example, in existence upon competition within the petroleum—sale of retail petroluem products? A. Well, a major consequence of the level of crude pricing system has been to—have a tendency to dry up the supply of unbranded gasoline to the price marketers. The logic of the incremental barrel which was mentioned by witnesses this week has been in a sense overruled by the fact that an incremental barrel has to be produced out of expensive (T. 584) oil instead of cheap oil, and, therefore, the—those refiners do not have self-sufficiency in crude find themselves in a strain not to produce gasoline much beyond their own requirements, at least during the months of April, May, June this resulted in a distinct tightening of the supply of unbranded gasoline and a very significant rise in the stock market price for unbranded gasoline.

Q. Dr. Patterson, I think it might be helpful to the court since you have been discussing competition perhaps in you would give us a capsule description and definition of what you mean when you use the word competition. A. I'm using the term in the sense that I think the economic witnesses during the week have used and I'm talking about the rivalry between firms for customers in the marketplace.

Q. Is it normal or would it be consistent with your normal view of the competitive process that government should interfere and offer some protection or shield to the certain actors within that competitive process? A. Well, I think the government has a role of maintaining a rules of the game because there is a tendency with a complete handsoff policy for on occasion for competi-

tion to be lessened or weakened by the evolution of the process so—but it seems to me the government's role is in preserving the vigor of the process rather than preserving actors or (T. 585) this sort of thing so I do see a distinct role it seems to me the anti-trust rules—anti-trust laws are a prime example of the appropriate approach that the government should take to the maintenance of competition.

Q. Would it be your opinion that the Paragraphs B and C of the Maryland Act as it would affect competition would be an appropriate government role in that context? A. It seems to me they are consistent with the philosophy of trying to maintain competition as a regulator of economic activity.

Q. Why—is there any reason why this would be necessary in this particular area of competition, the retail marketing of gasoline? A. Well, it turns out that the financial power of the integrated firm can be focused through those price supports on firms—nonintegrated firms making trouble by ousting price and trying to take a bigger share of the market. To the extent that those practices tend to dampen that competitive gas buyer's interests in trying to get a larger discount that in a sense frustrates the competitive process.

(Mr. Woodstock) No further questions, Your Honor.

CROSS EXAMINATION

By Mr. Simon:

Q. Professor Patterson, you deposition was taken in this case, was it not, on August 4, 1975. A. August 4 and 5, I believe.

Q. August of nine— (T. 586) A. Yes, sir.

Q. Since that time have you conducted any additional research on gasoline marketing in Maryland? A. I have

looked at the materials in the gasoline tax booklets and I have looked at a study prepared by Professor Allen Page. I have read about—what I could find about Maryland so I've looked at records of the case and materials that have been produced on discovery and that sort of thing.

Q. You said just a moment ago that you looked at what you could find about Maryland. What did you find about Maryland that you looked at? A. Well, I've now a little better picture of who the actors are and the system than I had at that time. I know something about the firms, I have some better feel of the geography of the state. I know something about the exchange agreements in this state at this time.

Q. Now, sir, in your testimony you talked about price takers and price setters. A. Yes, sir.

Q. Who are the price takers in Maryland? A. It's very awkward for anyone to look at a still picture of a market especially in a market which has been so distorted by the federal regulations to really see how competition might normally work in this market. I am not able (T. 587) to idenfity in the way I would like to what's the price behavior in a—the changing price behavior of the actors in this market would be. This is one of the great difficulties of coming into the market in an unnatural period and trying to look at it and see. We do not have normal price behavior now, and, therefore, it's not possible to really identify those actors.

Q. Well, whether you take the present time or the Sixties or the early Seventies or any period of time that you desire to take, can you identify for me who the price setters are or ever have been in Maryland.

(Mr. Woodstock) Objection, Your Honor, the question is assuming facts not in evidence. The witness could not

testify as to knowledge of the Maryland market prior to the time that he was retained as an expert witness.

(Mr. Simon) Well, I submit, Your Honor, that his—it goes to his capacity as an expert on Maryland marketing.

(Court) All right, he said he looked at the records in the tax office and he didn't say when. So I'll let him answer it if he can.

A. The when was in September, Your Honor, the period before Labor Day. The—I have no way of identifying who the these actors are in the state now because I don't have any retroactive reference to look at. All I can see now is a still (T. 588) picture of how the market looks under unnatural conditions.

Q. My question is as of any time can you tell me who the price setters are or have been in Maryland? A. Well, since I didn't look at Maryland before, I cannot.

Q. Can you tell me as of now who are the price takers in Maryland? A. The same answer would apply, sir, since I don't know how these people would behave in setting prices under normal conditions and we don't have normal conditions since I've been in this case, I can't tell you that.

Q. Do you know, sir, whether BP Gas and Go stations are price takers or price setters in Maryland?

(Court) Excuse me, Mr. Simon, this jargon leaves me a little puzzled. Can you ask the Professor to define what he means by this?

(Mr. Simon) Yes, sir. I apologize, Your Honor. We took his deposition and I was familiar and I—

Q. Would you please define, sir, what you mean by price setters and price takers? A. I don't have a formal definition but I'm trying to distinguish between those—every firm in the market obviously has a price but some firms tend to be aggressive in setting the price and others

tend to take whatever the market gives them and ride with that so I'm trying to distingusih between (T. 589) those who initiate the going price and those who merely passively respond to whatever that market price is.

Q. Now, sir, can you tell me whether BP is a price setter or a price taker under your definition? A. I cannot in Maryland.

Q. Do you know whether Kayo is a price setter or a price taker? A. I know of no price setters and price takers in the State of Maryland.

Q. And no matter whom I name your answer would be the same, is that correct? A. That's right, sir.

Q. Now you testified on direct examination that you and Professor Allvine wrote the book COMPETITION LIMITED; and is it not true, sir, that the research that you did for this book consisted of wholly reading materials in libraries and conversations with members of SIGMA meaning a acronym for Society of Independent Gasoline Marketers? A. You're talking only of my role or both people—

Q. Take first you— A. —or are you saying is there anything else in these besides that?

Q. Take first your role, sir. A. My role is essentially as you described it. I (T. 590) participated in a survey of prices in St. Louis, but that was the only price survey that I participated in. Professor Allvine conducted the surveys in basically the other cities.

Q. And it is true, sir, that your research consisted of reading materials in libraries and talking to members of SIGMA? A. I guess with one or two exceptions we talked to, of course, someone from American Oil and I think Mr. Allvine talked to someone from Shell.

Q. Now, sir, is it not true that the members of SIGMA are the owners of large chains of salary operated, private brand stations? A. As far as I know, that's true. There are

some chains that are owned by other companies who are members of SIGMA so that there would be oil company chains, secondary brand chains also as part of the SIGMA membership.

Q. But they would all be selling under a private brand or– A. A secondary private brand, that is right.

Q. And they are all salary operated, the chains, are they not? A. No, not all of them.

Q. Do you know of any that aren't? A. I believe, for example, Zephr is not.

(T. 591) Q. Any others?

(Court) What was that, sir?

(Mr. Simon) Zephr.

A. Zephr which is a brand of J. D. Street, the president of SIGMA last year who later was–is a chain. There are some who have mixed operations. I don't have a list in front of me. Perhaps if I had names, I could be a little more specific, but there are–I would grant your position that dominant view–the dominant operating style of its members is direct operations.

Q. And is it not true, sir, that the members of SIGMA generally became successful millionaires and developed the large chains of private brand stations in the last fifteen years? A. It was a post World War II success story, yes.

Q. And the active members all became millionaires out of it, did they not? A. I haven't seen their financial records. A very large of them have been–become very wealthy as a result of pursuing this strategy.

Q. And is it not true, sir, that the book was subsidized by SIGMA? A. In an indirect way, that is true. The SIGMA had a committee which made a grant, a research grant, to Northwestern University, which included funds to cover travel (T. 592) expenses, summer salary for myself and Professor Allvine, research assistance from the

graduate program there and overhead on the project, the university and with that research grant we were able to get around the country and talk to people.

Q. Now, sir, your second book, HIGHWAY ROBBERY, is it not true that at least roughly fifty percent of what's in the second book is just taken out of the first book? A. The part that describes the market behavior, I'm sorrry I can't answer the percentage, I have a work count, but the part that relates to description of marketing practices of the firms is a condensation of the material in the first book, that is true, sir.

Q. And is it not true, sir, that the second book was subsidized by the Council for–of Independent Petroleum Marketers? A. I think it's gasoline marketers.

(Court) Council of what, sir? A. Council of Gasoline Marketers. This is a group, Your Honor, that consists of something around twenty of these true nonintegrated independent marketers, not affiliated in any way with major brands except to supply relationships and the Council consists of the chief executive of those firms. Again that group made a grant to Georgia Institute of Technology and I assume it was along the same lines, namely, a (T. 593) paid salary to Professor Allvine and myself when we took off time from teaching to work on the book and it covered secretarial and travel expenses and graduate student expenses and it took a big hunk of overhead for Georgia Tech.

Q. And you personally received six thousand dollars of that Council's money, didn't you? A. Since you asked me that on deposition, I checked and that is true, exactly six thousand.

Q. Now is it not– A. Mostly for travel I mean when I went to Atlanta–

Q. Yes. A. –or to somewhere–

Q. Is it not true, sir, that the Council of Independent Gasoline Marketers is a split-off of SIGMA? A. Well, I believe all of the members of the Council are also members of SIGMA and some of them have been important influences in SIGMA, for example, Mrs. Hudson or Mrs. Vandegrift, who was here yesterday, Miss Hudson, Mrs. Vandegrift was—is a member of that Council.

Q. And is it not true, sir, that the members of the Council have been described by you as a split of the more radical group of SIGMA? A. I—I'm sure I said that, probably an extreme choice of words. It is a group which felt that they needed to act (T. 594) quickly during this period of rapid change and their plight and the procedures of the SIGMA, which was a very large organization, and which contained a large number of members who were tied in a complicated way to major interests was not able to act and so this was an effort to pull out of SIGMA and to act on certain policy matters and Congress during the period of the crisis.

Q. Now in your reference to this group as a more radical group, sir, what did you mean? A. I meant that they were more willing to look at structural change in the industry as a approach to policy.

Q. And is it not also true that you said that by the time SIGMA or the Council was formed SIGMA was no longer and I quote "an important force for political reform"? A. The reason being that—

Q. First, did you say that, sir? A. Well, if you read—I'm sure I would say it again I guess—If I didn't say it that time. The fact was that the whole decision making machinery of SIGMA by this time had become very cumbersome given the rapid change of things that were going on in Washington in the energy picture.

Q. Now, sir, do these books reflect the views of the SIGMA members and the Council members? A. Parts of them do not. In the first book one of the (T. 595) recommendations were made was that the majors—no major be permitted to buy an independent. One of the problems of our research during the period was that a way of dealing with intertype competition when it became too troublesome was to buy out that actor and there is a long record of buy-outs. Professor Allvine and I believe that that should stop; and we proposed—that is the policy recommendation; but members of SIGMA, however, who are as you point out rich businessmen many of them without apparent errors in the company didn't like the fact that this would cut off a way of liquidating their estates and so they opposed that or many of them opposed it. I'm sure there are other differences.

Q. Can you name any other viewpoint expressed in these books that do not reflect the views of the two groups that subsidized the books? A. Well, I guess I don't know how to find out what the views of the two groups are and that's—I mean I don't have a list of that, but from the deposition you read to me during my deposition they seemed to imply that at least the leadership structure of SIGMA was opposed to divestiture as a remedy so they didn't buy that idea.

Q. So far as you know, Dr. Patterson, what the views of these two groups of private brand marketers are, is there any other respect in which these books don't reflect the views (T. 596) of the groups that subsidized the publications, the books? A. I am not—I am unaware of them. There may be.

Q. As a matter of fact, doesn't the first book say that you are deeply indebted to the president of Martin Oil Company for his assistance to you in writing the book?

A. The second book is dedicated to him, sir.

Q. And he—Martin Oil Company is a private brand, independent marketer, is it not? A. One of the price setters that I'd like to identify if they had been in Maryland.

Q. Yes, sir, but they have no stations in Maryland, do they? A. As far as I know, they do not.

Q. Now, sir, can you identify in the State of Maryland any business firm that you regard as a truly independent private brand, low price competitor in the market? A. I'm having trouble on the specific Maryland dimension of that because as I say I haven't seen the price behavior in a normal situation, but I would expect Hudson, Fisca, firms like this—

(Court) What was the second one, please?

A. F I S C A, Fisca which is owned by a brother of Hudson—Mrs. Hudson. The—this type of firm, there are a few of them, not very many.

(T. 597) Q. Well now, how many Hudson stations are there in Maryland, do you know? A. I within the hour looked at that in the thing and I'm sorry I've forgotten it already.

Q. It's like three or four, isn't it? A. Or maybe five.

Q. All right and how many Fisca stations? A. And I believe that may be, again if I could look at the record, something like two or three.

Q. So we're talking about four or six stations? A. That's right. The—

Q. All right the— A. Maryland is characterized by an absence of this important type of marketer.

Q. Now except for these four or six stations, can you identify in this State of Maryland any other places that sell gasoline that fit your model of the private brand, independent price discounter? A. I mean if I could go through the list, I might be able to say what I thought

they were, but not having seen them in a normal situation, I don't think I can authoritatively say what their price behavior is in Maryland. I have seen those firms under more traditional circumstances in other markets and some of those firms if they're listed, they are (T. 598) price setters, aggressive discounters, striving to get a bigger discount for them.

Q. I'm sure that you would agree that Phil Syton and Maurice Cappolo are price setters? A. Those are the kind of firms I'm talking about.

Q. But they aren't in Maryland, are they? A. I don't see them on the list.

Q. No, sir. Now isn't it true that the extent to which the opinions you gave Mr. Woodstock are applicable to the State of Maryland would depend very largely if not wholly on the extent to which the kind of marketers you were talking about exist in the State of Maryland? A. Or might be induced to enter the State of Maryland.

Q. All right, that's true, is it not? A. If there were no actor like that who would strive to get a bigger discount and to bring the price structure down, then you could expect very high prices in the State of Maryland and it suggests the problem with competition in the State of Maryland.

Q. But is it not true, if you could give me a direct answer, sir, is it not true tht the extent to which your answers to Mr. Woodstock's questions apply to the State of Maryland is in direct proportion to the extent to which the group of people whom you call price setters in fact exist in (T. 599) Maryland? A. Well, it could be induced to exist.

Q. All right. Now you have talked previously about independents—or I'm sorry, majors who masquerade as independents. What do you mean by that, sir? A. These are the secondary brands of the true majors, Alert, Sun Oil.

Q. Now do you measure the competitive viability of a merchant by who owns the stock in the company or by his behavior in the marketplace? A. By his behavior, that's the critical test.

Q. And that's the test that counts, is it not? A. But you wouldn't deny that the behavior is the product of his ownership, would you?

Q. I– A. Or at least I would say that with reference to forecasting what the behavior might be.

Q. Let's get an answer to my question first and I'll be glad to explore your comment. Is it true that the competitive behavior is the only effective measure of competition and it is irrelevant who owns the company so far as the measure of competition is concerned? A. The primary test would be the behavior.

Q. All right, now you suggest that the behavior may be (T. 600) measured by the ownership of the company, is that the suggestion of your remarks? A. My proposal, sir, is that the structure of the market including the ownership and the association with others and all these other factors that we theorists in industrial organization typically use is an important influence on the behavior of the actors in that market and on the performance of the process.

Q. Now, sir, if in fact BP Gas and Go stations are low priced price setters, is that pro-competitive regardless of who owns BP? A. If that were true, I would say yes, sir.

Q. And do you know– A. You said price setter now, you didn't say price taker–

Q. Yes, sir, I certainly did. I certainly did; and do you know who owns BP? A. BP Oil which is owned-subsidiary of Sun Oil.

(Court) Of what, sir? A. Standard Oil of Ohio.

(Court) All right.

Q. Doesn't BP stand for British Petroleum? A. It does, sir.

Q. And doesn't British Petroleum own the BP stations (T. 601) as well as Standard Oil of Ohio? A. There's a relationship to be worked out I understand when the offshore oil comes in then it will determine whether it will buy that company.

Q. And BP or British Petroelum Corporation is one of the half dozen largest oil companies in the world, is it not? A. And a large share of it is owned by the Crown.

Q. Sir? A. And a large share of it is owned by the United Kingdom.

Q. But it is one of the– A. Yes, it is–

Q. –half dozen– A. –one of the seven biggest.

Q. It's one of the half dozen largest oil corporations in the world, is it not? A. That is right.

Q. Now, sir, you have stressed a great deal in your testimony here today intertype competition. A. Correct.

Q. And while I am – was unfamiliar with the term prior to your testimony, you consider that–what you call intertype competition to be the critical yardstick of measuring competition in the marketplace, do you not? (T. 602) A. In the gasoline business.

Q. Yes, that's what we're talking about, yes. Now I assume that the phrase intertype competition means competition between one type of business entity and another type of business entity, is that correct? A. Yes, sir.

Q. And one type of business entity is service stations operated by dealers who either lease the station or own the station and buy gasoline from a supplier and resell it under a brand name, that's of one type, is it not? A. Yes, sir.

Q. And another type would be a company operated service station selling under a brand name, is that not correct? A. Not in my classification. It's a type – I mean

it's a different type of station but I try to characterize the critical types in trying to understand the competitive process in the gasoline industry as those that tend to use the major brand style and those nonintegrated firms that tend to emphasize price and less or no service; and mass merchandising.

Q. Well, is it your testimony, sir, that there is no relevance whatever and no difference whatever in the type as you use the phrase between company operated Shell stations and dealer operated Shell stations? A. On—there's a difference and there's an impact but (T. 603) on what? I'm sorry, but I don't understand what—you said there's no relevance or meaning with respect to what?

Q. Is there a relevance or a meaning as to intertype competition between company operated stations and dealer operated stations? A. Yes, there will be a—if a company operated station by a large major oil firm would be a way of dealing with intertype competition which would be much more damaging intertype competition than would dealing—than competing through dealers.

Q. Now, sir, to the extent that branded major company dealers for whatever reason are reluctant to engage in price competition with the price discounters, would it not be procompetitive for company owned and operated stations of that brand such as Shell, for example, to engage in price competition with the price discounters? A. Competition to where somebody has to cut the price and someone else has to respond so in a sense that the response would come as a result of the direct operation, I would say yes, sir.

Q. So that if the Shell Oil Company were tomorrow to open twenty service stations in Maryland which they gave no facilty—had no facilities whatever for repair work or didn't sell tires, just a self-service gasoline only at a lower

price than Shell dealers are charging in Maryland, that (T. 604) would be pro-competitive, wouldn't it? A. But if you—

Q. Can you answer my— A. If I have to stop there, and I can't go any further with the processes likely to unfold, so far it would be pro-competitive.

Q. All right, now what process do you say is likely to unfold? A. If that become a technique for focusing the price cuts on those stations close by, the aggressive intertype competitor, the private brand marketer, that is likely to dissuade him from being so aggressive and the net result of this process will be to harm competition.

Q. Well, are you aware of the fact, Dr. Patterson, that the Shell Oil Company has in fact built several hundred gasoline only, self service only, company operated, employee operated service stations selling gasoline at low prices with salaried employees? A. Yes, sir.

Q. And do you consider that a pre-competitive set in the sale of gasoline? A. It's pro-competitive in the sense that it responds to a legitimate demand for a new—makes a new retail offer. It could, however, be anti-competitive in a sense that it (T. 605) could be a way of focusing the financial power of Shell Oil on the price cutter.

Q. Well, are you saying, sir, that the law should protect or shield the price cutter from competition from somebody else? A. No, sir, I'm not saying that.

Q. And you don't believe that the Maryland Legislature would be acting in the public interest if they sought to shield any one group of marketers from competition from another group, do you? A. I don't want to rule out the—in fact it seems to me the whole purpose of governmental intervention in the preservation of the maintenance of competition is to stop the process which might carry to its conclusion, produce less competition so I'm not against shielding certain classes of actors in the

system in order to preserve the process of competition as a regulator of business behavior.

Q. Do you mean by that that you would protect these people just for the sake of protecting a group that you favor or do you mean that you would protect them only against unfair competition? A. There is an element of predatory actors here that is important to sheild actors in the system from.

Q. Well, putting aside predatory conduct which is (T. 606) already illegal under many statutes before this statute was passed, is there anything anti-competitive in major oil companies opening company operated service stations selling gasoline at lower prices to compete with the price discounter you've been talking about? A. Only to the extent that if those stations are used to check the tendency of the price setter, the aggressive price setter to try to strive for lower price of gasoline.

Q. And absent that conduct which I assume you would call predatory, wouldn't you? A. Well, that's a legal–technical problem. I see it as predatory, whether it would be predatory under the law–

Q. But absent that conduct you believe it would be procompetitive to have the situation I've been discussing, do you not? A. In the limited dimension that you've talked about, pro-competitive.

Q. Yes, sir. Now one of the things you've talked about this morning was the margin. I take it you were talking about the retail margin? A. And the jobber margin.

Q. Yes, sir and what was the retailer or dealer margin prior to the 1973 energy crisis? A. The normal margin was something in the neighborhood (T. 607) of seven cents for the retailer.

Q. And under the FEA price ceilings what was the dealer margin? A. As I recall it was permitted to go on up about eleven cents.

Q. Did you not testify in your deposition that the FEA was coerced or compelled to raise that dealer margin by what you classify unarmed rebellion of the retail dealers? A. I–that's probably true but I don't remember the exact language.

Q. And the price rise–the rise in dealer margins came as a result of dealer threats to the Federal Government to close their stations unless their margins were increased, isn't that true? A. Dealers or–

(Mr. Woodstock) Objection, Your Honor. I don't–regardless of–if he's saying that's what Dr. Patterson's comments were, well, fine. If he's asking for–as a statement of fact as to why FEA did anything, I think it should be stricken from the record. Dr. Patterson can't comment on as to why FEA did what it did, only as to his opinion.

(Court) Well, as I understand the question it focused on whether or not Dr. Patterson was of that mind in writing the book, isn't that–

(T. 608) A. Or making the statement at the deposition.

Q. Yes and that is your opinion, is it not, sir? A. Yes, it was strictly, or not strictly, but heavily influenced by strong dealer pressure brought to bear.

Q. And is it not true, sir, that the increase in dealer margin from seven cents a gallon to eleven cents a gallon came in the face of reduced dealers costs, dealer operating costs? A. Yes, Sir, dealers were running shorter hours with less people and not running their lights as long and that's true.

Q. And, therefore, the dealers got an increased margin when they were having lower costs? A. Yes, true.

Q. And this is certainly contrary to all the rules of economics of what prevails in a competitive market, isn't it? A. Well, it was not a competitive market obviously.

Q. Yes, but I say that's contrary to the rules– A. Yes.

Q. —of the competitive market, is it not? A. Yes.

Q. And, therefore, would it not be pro-competitive, sir, for a major oil company to operate company stations at selling gasoline at what you would agree as a reasonable (T. 609) margin whatever that might be? A. With respect to that particular part of it, it would be pro-competitive.

Q. Yes. A. There would be other dimensions to it, however.

Q. There are always other dimensions to everything, aren't there? But it would increase competition, would it not, to— A. It would lower the margin if the oil companies came in with direct operated stations and ran them at five cent markup instead of eight cents.

Q. Or even seven cents? A. Or even seven.

Q. And that would be to the benefit of the public, would it not? A. It sure would.

Q. Now, sir, the service station dealers in Maryland, the retail service station dealers who are largely major brand service station dealers vigorously support this legislation. As a marketing expert, what in your opinion is the economic reason that they support this legislation? A. I think they probably see a trend in the direction of direct operations if legislation like this is not enacted and the result will be a decline in the opportunity for (T. 610) dealerships and, therefore, a decrease in the population of dealers and probably a relegation to dealers of the less profitable stations and a going back into the owner of the oil company of those stations which have high volume profit prospects.

Q. And do you also believe, sir, that they properly see competition for the amount of the margin they're going to be able to charge the public? A. No question about that.

Q. No question about it, is there? A. They see this is a

way that their supplier will probably try to raise the margin that they charge.

Q. And it's in the public interest to reduce that margin, isn't it? A. It is.

Q. And one of the effects of this legislation would be, would it not, to protect the branded dealers charging an eleven cent margin against competition from company operated stations of a branded supplier? A. Of an integrated producer-refiner, yes, it would.

Q. And that's not in the public interest, is it? A. That part of the law is not.

Q. Now, sir, you testified this morning that even after the repeal of the depletion allowance the production (T. 611) of crude oil was the profitable end of the oil business. What's the basis for that opinion? A. We've had a dramatic increase in the price of oil and the same time we've lost a tax shelter from the crude oil.

Q. Do you have any knowledge, sir, of what the current cost of finding oil is? A. I have seen different figures. It obviously varies from field to field.

Q. Do you know whether the current costs of finding oil are higher than the present prices of oil? Crude oil? A. Give me—for example are you talking about the amount of float?

Q. I'm— A. I mean if you're—I mean it depends upon the cost of finding oil depends upon the amount of oil you can draw out of a reservoir and—

Q. Excuse me, Mr. Patterson, I'm not asking you what I think, I'm asking you what you testified to. You testified that the crude oil end of the business was still the most profitable in the business; and I'm asking you do you know whether the present cost of finding oil is more than the present cost of crude oil? A. I don't know how to answer that in that strain.

Q. Can you answer it, sir? (T. 612) A. I don't know that anyone can.

Q. Well, can you answer it? A. I cannot.

Q. All right. Now is it your opinion, sir, that the role of government in maintaining competition should shield any group of competitor from any other non-predatory competition? A. If you define non-predatory as fair competition, I would say not.

Q. And, therefore, to the extent that Sections B and C of this statute prevent competition between supplier operated service stations and major brand dealers, is the statute not performing the proper government role? A. But that has to be taken on that, I would agree with that, but I—you should look at the other sections as well.

Q. Can only ask one question at a time. A. Right.

Q. Is it also true, sir, that to the extent that the statute prohibits supplier company operated service stations from competing in fair competition with the discount service stations, the statute is not performing a proper government role in your opinion? A. Applying to that example, I would say yes.

Q. And is it true that your testimony and response (T. 613) to questions by Mr. Woodstock that it was the role of government to maintain the vigor of the competitive process would include competition, fair competition between major company salary operated stations and any other segment of the economy, the gasoline economy? A. I guess I lost the question part way through. It seems to me—

(Court) I think I did, too. Would you mind—

(Mr. Simon) Yes, sir.

(Court) —asking that over, sir.

Q. Is it your testimony, sir, that the proper role of government in preserving the vigor of the competitive process to which you testified on direct examination is

not being performed when the government prohibits fair competition between salary operated company stations of a supplier and any other segment of the gasoline economy? A. Given that limited statement, I would say yes.

Q. Thank you. Now in response to a question by Mr. Woodstock, you said that you were troubled by the fact that the statute prohibited integrated discounters from maintaining company operated stations but that you find that they are price takers not price setters. Are my notes accurate as to your testimony? (T. 614) A. They typically are price takers in my experience outside of Maryland where I—

Q. That's the question I was going to ask you. Can you name for me any integrated discounter in Maryland who is a price taker and not a price setter? A. No. I said, sir, that I have not been able to see how Maryland works because it doesn't work right in the current scene. I haven't been here before.

Q. Then your answer to Mr. Woodstock's question which I have just summarized does—has no application to Maryland, does it? A. I would hope that general knowledge would have some implication as far as specific cases, but if it would be subject to this confirmation, that some evidence came up in Maryland and showed Maryland was unlike the rest of the United States.

Q. The fact is you have no knowledge of— A. I have no specific knowledge of Maryland.

Q. And you cannot tell me, can you, sir, whether any particular company that I would name that is an integrated discounter is a price taker or a price setter? A. No, sir.

Q. Now you said that the only discounters that you would protect or shield are those who reduce their prices (T. 615) because they think they can get away with it.

What did you mean by that? A. That they—no one would try to cut price unless he thinks that he can maintain the increased volume that he gets from it. If the price cuts will be immediately countered by his competitors to the full extent, then it would be typically a self-defeating move. So if the actor thinks that the move is not self-defeating, that he will be able, if you will, to get away with the making the price cut and not being met head on immediately, he would have more motivation to make the price cut than would be the case if he knew that as soon he cut price, his competitors would meet him exactly and neither one would change the market sharing.

Q. And that's true, sir, no matter who the marketer is, is it not? A. That would be true.

Q. Doesn't make any difference whether it's a major oil company or the independent with one station? That's equally true, isn't it? A. May I make a point.

Q. Yes, sir. Would you answer my question though and then make your point. A. That's true except that the circumstances the actor finds himself in heavily influences the likelihood that he (T. 616) would get away with it.

Q. Now is it not true as a matter of economics or at least textbook economics that one can chart on a graph what your volume will be at each different price level and as your price goes down, your volume should go up. Now that's correct, isn't it? A. That would be true in certain likely situations but in the autotypolistic market structure which is typical of a retail situation that's not so easy because what impact the price cut—the price cutter gets will be the function of the response that his competitor makes and in a interdependent market, a market characterized by only a few sellers which is

typical of retail corner is not that easy to try to forecast what the response will be.

Q. Well, I'd like to be a little more specific, Dr. Patterson. There are Shell stations that sell two hundred thousand gallons of gasoline a month. A. Yes, sir.

Q. There are other Shell stations that sell twenty-five or thirty thousand gallons of gasoline. A. (Unintelligible, talked too fast.)

Q. And you would assume, would you not, that the station selling two hundred thousand gallons a month is charging a laower price, would you not? (T. 617) A. Well, that's—it could be due to many things, but it certainly would have to be competitive on price.

Q. Yes and the point I'm trying to get at is is it not true that net profit is a combination of the factor of price and volume? A. It sure is.

Q. And your net profit is a mixture of selling at the lowest price to get the highest volume of maximize ultimate net profit, is that not true? A. That's—one would have to look at the relationship between the major cost change as a result of the volume increase, behavior of revenues, but there would be a relationship which would move in that direction, economic devastation.

Q. And isn't that economic fact of the gasoline business equally true of any marketer no matter who he is? A. That would be true except the likelihood of being able to retain the volume change as a result of using price cuts. If the Shell station across from a Texaco station cut its price, the Texaco station by virtue of being a common competitor, one that's a similar type would have to cut its price in order to not lose its business and if both of them cut their price, it's unlikely that you would begin to draw business from down the street, but you wouldn't get (T. 618) the same increase in volume that you would get if you weren't compelled to meet each others's price.

Q. Isn't the converse true, Dr. Patterson, if the Shell and the Texaco stations on those—that corner were two or three cents a gallon lower in price than the rest of the town, wouldn't they both gain very substantially in volume? A. There would be, of course, limitations due to ignorance and inconveniences and so on, but if they were the low price in the town, they would gain business, there's no question about that.

Q. Yes, sir and if they gained enough business, they could make more money at the lower price, than they had previously made at the higher price, couldn't they? A. But as soon as others began to lose business to them, then the price would go down to check that.

Q. And that's equally true of the price discounter whom you call a price setter as it is for the Shell company operated stations, is it not? A. Yes, sir.

Q. Now is your view of the model of competition in your view of the appropriate model for competition that one should look at innovations, progress and consumer convenience? A. Certainly.

(T. 619) Q. Is it not in the public interest to encourage the Shell Oil Company, for example, to open a wholly self-service station with no employees at all where you dispense the gasoline out of the tank yourself and you put either a credit card or dollar bills into a machine which then automatically gives you the amount of gasoline you put the money in the machine for? A. If there were no other negative concepts of that, that would be excellent.

Q. That would be very good, would it not? A. I'm not sure that I want it but I would like to have that option open for the people who would want it.

Q. And is it not true that this statute would inhibit such innovation? A. It would to some extent but it would also enhance certain other innovators.

Q. Well, of course, I suppose that everything in life from marijuana to whatever you can think of that's best has both plusses and minuses, doesn't it? A. There is a need to look at the cross benefit analysis of this sort of thing, yes, sir.

Q. Have you made any cross benefit analysis of the pros and the cons of this statute as it applies to the gasoline industry in Maryland? (T. 620) A. In a sense that's what I have been doing in this case, not a big one, but my point in trying to follow a conclusion about the impacts of this law on the consumer welfare of the motorist in the State of Maryland is to look at what it's going to cost them in the way of the kinds of costs we're talking about and the benefits they will get from enhanced intertype competition.

Q. Now I—

(Court) Excuse me a minute, Mr. Simon, but we have run a half an hour past the usual time unless you have something that you really want to finish, sir.

(Mr. Simon) No, sir.

(Court) Suppose we recess until two o'clock. Professor Patterson, please do not discuss your testimony with anyone during the recess.

(Lunch Recess)

(Court) Professor, you want to resume the stand please?

(Mr. Simon) I just have a few more questions, Your Honor—

(Court) All right, sir.

(Mr. Simon) —and I'll be finished.

Q. Dr. Patterson, have you ever made a cost benefit analysis of this statute in terms of its dollar effect on (T. 621) Maryland motorists? A. No, sir.

Q. Do you know of anybody who has? A. No, sir.

Q. At page 209 of your book, COMPETITION

LIMITED, you say and I quote "The purchases of price marketers by some of the major oil companies such as Continental and Tenneco and their continued operation as aggressive secondary price brands does not yet seem to have weakened intertype competition." Are you familiar with that statement? A. It's been a while, but I agree that it said that, sure.

Q. Now the purchase of a price marketer by Continental Oil Company was its purchase of Kayo, was it not? A. Yes, sir.

Q. Has any—have you become acquainted with any facts o: has any knowledge come to you since this book was written that would change your statement that Continental's purchase of Kayo has not weakened intertype competition? A. One fact.

Q. What is that, sir? A. The move forward on a broad scale into direct operations has resulted in a much more balanced integration of the principal suppliers of gasoline and as a result has had an (T. 622) impact on the supply of gasoline available to the nonintegrated marketers.

Q. That has no relationship to Continental's acts with respect to Kayo, does it? A. That's part of a basic trend of which the Continental is one component of it.

Q. Has Continental changed its performance, competitive performance in the Kayo operations since the time you wrote this book? A. Not that I'm aware of.

Q. Now, sir, in your direct examination this morning you said that as a result of this statute there were price makers, the independent or private brand discount variety who would come into this market as a result of this statute. Can you name any such price marketer whom you have any reason to believe will come into Maryland if the validity of this statute is sustained? A. I do not know any specific price marketer, only that remark was intended to discuss a class of actors.

Q. But you have no knowledge of any— A. No, sir.

Q. —body who plans to come into Maryland if the statute is sustained? A. No, sir.

(T. 623) Q. Now, sir, in response to a question on direct examination you testified that the role of government intervention should be only to maintain the "rules of the game" and I ask you if you have any knowledge of any fact that any of the Plaintiffs in these cases has not conducted itself in the State of Maryland according to the "rules of the game?" A. No, sir, I do not.

Q. You will recall that on—under date of July 1, 1975, you filed an addifavit or you executed an affidavit which was filed in this case. A. Yes, sir.

Q. And in that affidavit, on page four describing a chapter of your second book you say that the result of changing factors in the industry has resulted in certain changes in the marketing practices of gasoline; and then you say and I quote "Among the documented moves are the following: one, direct entry into private brand discount marketing through the use of secondary brands." Do you find that a good or a bad thing? A. It is both.

Q. Well, at your deposition in this case at page 304 I asked you if you were asked these questions and you made these answers. "Q. Among the documented moves are the following one, direct entry into private brand discount marketing through (T. 624) the use of secondary brands. Do you find that—Answer Yes, sir. Question Is that a good or a bad thing? Answer I find that good." Did you make those answers to those questions at your deposition? A. I'm sure I did.

Q. And has anything occurred since the deposition was taken two months ago to change your opinion? A. Well, I'm not sure the deposition, I don't know in what

context that was exactly said, but I—as I just indicated I think there were positive features and there are negative features.

Q. But at the deposition you said only that you find it good; and my question is has anything come to your attention since then to change that opinion. A. I don't think that answer in the deposition was a true statement of what I believe. I mean I apparently misunderstood a question or misspoke myself at that point.

Q. I see. The second factor here that you say is resulted from these changes is withdrawal from unprofitable marketing areas. Do you find that a good or a bad thing? A. Basically I find that a good thing.

Q. And the third thing you said was as a result of the changes in the industry was the accelerated closing of low volume stations. Do you find that a good or a bad thing? (T. 625) A. I find that a good thing.

Q. I'd like to show you the transcript and ask you if you misunderstood me or the transcript indicates that your answer was taken out of context as to the answer you gave about the entry of—into private brand discounting through the use of secondary brands. Have I been unfair to you in taking that sen—that answer out of context? A. No, that's – that's in context. My answer I assume is intended to view that specific point by itself namely that response to a revealed market segment by actors in a system is good. I agree with that.

Q. Just one last question. Do you know of any discounter or price competitor or price maker as you've described them doing business in the State of Maryland at this time who is not able to obtain all the gasoline he requires to conduct his business? A. No, there, I believe, at the current moment is a surplus of gasoline.

(Mr. Simon) Thank you. I have no further questions.

(Mr. Drogula) May I proceed?

(Court) Yes, sir.

CROSS EXAMINATION

By Mr. Drogula:

Q. Professor Patterson, my name is Fred Drogula on (T. 626) behalf of Ashland Oil in this litigation. You testified on direct examination that you have been troubled over the application of Chapter 854 to companies like Ashland who you classify as refiner-marketers, is that correct? A. Yes, sir.

Q. Does that reflect the fact that at your deposition approximately sixty days ago you did not have an opinion at that time as to whether this law made good economic sense as to Ashland? A. I reserved the right at that time, yes, sir.

Q. In fact you reserved the right to testify in this litigation that the statute does not make economic sense to Ashland, did you not? A. Yes, sir.

Q. Since that time in the past sixty days, what if any investigation or study have you conducted to assist you in forming the opinion you expressed today? A. No study in the sense that I went out and got data, reflection on the scenario of consequences.

Q. In other words you just thought about it? A. I thought about it.

Q. All right, would you please describe to the court your understanding of exactly what a refiner-marketer is? A. My definition will not conform to Mr. Coleman's. (T. 627) I tend to classify the minor majors as refiner-marketers, those that are not heavily self-sufficient in crude, those that are primarily buyers of crude and then refiners and marketers and wholesalers of gasoline.

Q. Are you aware then that Ashland Oil is substantially crude deficient? A. Yes, sir.

Q. Are you aware that it markets a substantial portion of its refined petroleum products to independent gasoline marketers? A. That's the feature of the dilemma that you

posed for me in July or in August that gave me pause. It's a matter of record that the independent refiner-marketers are a major source of unbranded gasoline to the price marketer, the nonintegrated price marketer who is the price maker in the marketplace.

Q. And that is extremely pro-competitive, is it not? A. That is right, sir.

Q. Do you strongly support the role of independent refiners like Ashland who exist in the marketplace to supply marketers? A. As a source of supply of unbranded gasoline, it's essential.

Q. Turning your attention back to the onset of the (T. 628) so-called fuels crisis in 1973, 1974, did Ashland and other crude deficient independent refiners experience economic injury or handicaps or hardships? A. Most certainly, the book HIGHWAY ROBBERY in fact has considerable correspondence with the president of Ashland, with the Office of Emergency Preparedness and other government agencies about this.

Q. Would you describe for the court very briefly what those economic hardships were that independent refiners experience? A. They were substantially cut back in the availability of crude which increased—decreased their output and increased their operating costs.

Q. And what was the result of that downstream to their independent marketers' customers? A. It dried up the unbranded gasoline available to those customers.

Q. Are you aware that the Federal Government intervened at that particular time to enact legislation to assist independent refiners and independent marketers? A. I was active in Congress at that time to encourage that, yes, sir, I'm well aware of that.

Q. You supported federal legislation? A. I did, sir.

(T. 629) Q. And what was the effect of that federal legislation very briefly upon independent refiners? A. It

tended to restore to them a share of the crude oil and to—also make through the entitlements program to attempt to equalize the cost of crude oil to them in order to reduce the impact of them buying the very high cost crude and their major competitors having a larger supply of price controlled crude.

Q. Would you then agree that independent refiners as well as the independent marketers you've testified about were among the victims of the so-called fuels crisis? A. That is right.

Q. Were you present in the court room yesterday during the testimony of Mr. Luellen of Ashland Oil? A. Yes, I was, yes, sir.

Q. Did you hear him say that in his opinion Ashland Oil must have company operated marketing outlets in order to protect its refinery operations? A. I did.

Q. Do you have any basis to disagree with that statement? A. There are and I don't disagree with his statement. That may his judgment about what is essential to Ashland. There are obviously examples of independent refiners who are not marketers who prosper.

(T. 630) Q. Independent refiners are, are they not, subject to substantial fluctuations both in supply and price? A. There is no question that in attempt to gain control of markets and to control crude is important to the stability and possibility of those firms, yes, sir. They are subject to variability and as a consequence are disadvantaged relative to the majors in that sense.

Q. So that in periods when their crude costs are high and their product costs are correspondingly high, would you agree that these company owned, retail, private brand outlets represent a form of a safety valve for their refined products? A. You said product prices are high?

Q. Yes. A. So that everything in the system is running at high level, high margins all the way through?

Q. Yes. A. Safety valve in the sense that if something changes later they're building a reserve to protect against that or something, yes, sir.

Q. During the period 1973-1974 did not customers of independent refiners such as Hudson and (unintelligible) move away from those suppliers in some instances to refiners having lower wholesale or tank wagon price? A. Yes, sir.

(T. 631) Q. And during those periods of time was it not imprtant to the independent refiners to have their own outlets to fall back on? A. I'm sure it was important to the independent at that point.

Q. In your books, Professor Patterson, you referred to the operating efficiencies which exist in connection between refining and marketing operation. Do you agree as of today that for a refiner-marketer there are pro-competitive marketing advantages that are experienced? A. There are efficiencies, whether those are pro-competitive depends upon how they're used, are they used to lower price, are they used to be more aggressive in the marketplace or are they merely taken as profits.

Q. Let's break it up then. First, what are the efficiencies? A. Well, the one you just mentioned is an important one, the stability of the relationship, a controlled market gives a certain stability in operations which is useful, as you take some of the uncertainty out of the planning, the logistics of supply in terms of delivery and economic quantities, these things, large sized deliveries, proper scheduling of the production, all of these things result in cost savings.

Q. Now your testimony today is that these efficiencies (T. 632) which offer the consumer a product at a lower price would not be pro-competitive? A. They may not offer their competitor the much lower price. In other words one has to look at how those efficiencies are used.

They can be used to merely to increase the profit of the firm rather than to be passed on at lower prices. There is a pool of resources that were saved by being more efficient that can be used in a number of ways.

Q. Have you in any way changed the opinions expressed in your book that forever what one might say about divorcement of crude production that there is no compelling reason to divest marketing from retailers? A. I have changed that as a result of th experiences of the last year and in particular the consequences of the governmental programs and response to the changed structure of the companies so that now it seems to me that there is a need to restrict the direct operation by vertical integrated companies of their stations because—for two reasons, one it creates a power to discipline by using specific price reductions in only those stations in face to face competition with the price marketers and the other thinking is that as more of the gasoline of the system is directed toward controlled, favored integrated outlets less of it will be made available in the future to price marketers. So it's a supply and a price (T. 633) behavior matter.

Q. These are not the views you expressed in your books as recently as 1974, are they? A. No, sir, those were based on an understanding of the structure of the industry that was in flux and was not very clear at the point of—when the book was written in late '73 and '74.

Q. I believe you indicated your agreement today with the statement Mr. Luellen made yesterday to the effect that independent refiners don't have the resources to engage in branded marketing in distant markets, is that correct? A. Yes, I believe that's true.

Q. ,In other words they market their branded outlets under the Ashland flag in those areas which are close to their refinery? A. Probably Marathon becomes the upper

limit of a firm of this sort that can go the branded route. I think firms beyond that face serious problems.

Q. So that in your opinion Ashland could not successfully engage in branded marketing in the State of Maryland? A. Flying Ashland brand with full service stations, I think that would not be a sensible policy.

Q. Mr. Luellen again said yesterday that Ashland would withdraw from the Maryland market if it were forced to abandon (T. 634) its company operated stations. Do you have any basis for disagreeing with Mr. Luellen's testimony? A. I'm sure he knows more about Ashland's policy than I do.

Q. So if he were to tell you that it would not be economically feasible for Ashland to operate those stations through dealers that's using margins of seven to eleven cents, you would have no basis to disagree with him? A. If that is the only way to deal with the situation, I would agree with it. I'm not sure that is the only response to the law.

Q. You heard Mary Hudson testify here yesterday, did you not? A. Yes, sir.

Q. Did you hear her say that she operates through company operated stations because she needs to control the price of the product sold? Did you hear that? A. Yes, sir.

Q. Did you also hear her say she needs to control the hours of operations and the cleanliness maintained at the various stations? A. But the Hudson operation is a nonintegrated operation.

Q. Well, I'm coming to that but did you hear her make those statements? (T. 635) A. Yes, sir.

Q. And do you agree with them? A. I believe that's absolutely the crux of the success of the discount marketer.

Q. Do you also believe that Ashland Oil as a crude

deficient, independent refiner that it is not logially entitled to use the same marketing strategy? A. Not if that harms the process of competition.

Q. Now please explain to me, sir, how does that harm the process of competition keeping in mind your testimony that Ashland is a crude deficient, independent refiner? A. So that your point is can I agree with you that there will not be the price cutting, price support behavior that wouldn't come so it wouldn't come through the supply cycle.

Q. Wait a minute. Excuse me. All right. A. Yes, sir.

Q. In other words you are agreeing with me that an independent oil company such as Ashland does not have the capacity to engage in unfair pricing practices in the market, it that right? A. Let me use the word focused price reductions in the market, that's right, I agree with you. If they do not have the deep pocket of resources necessary to do that that comes from substantial crude supply.

(T. 636) Q. Now you've indicated that your concern as to retailer marketer operations is essentially in your words because they're passive rather than aggressive price setters. Now Mr. Luellen again testified yesterday and I'm sure you heard him that he considered Ashland an aggressive price setter. Do you have any factual basis for disagreeing with that testimony? A. My only knowledge is based on behavior of Ashland in other markets and in my opinion from what I'm able to observe they tend to meet the price, they don't tend to set it. They are quick to come to the price that is being set.

Q. Ashland has seventeen stations operating in Maryland. Do you have any facts— A. I have no specific knowledge of the Maryland behavior.

Q. Well, if it should be the case that Ashland is an

aggressive price setter in Maryland, then is there any reason in your lexigon to deny Ashland the right to operate company owned stations in Maryland assuming, I'm premising the fact for you that they are an aggressive price setter. A. Would make it a very marginal argument on that opinion.

Q. In other words your support for excluding them would be a very marginal argument? A. That's right, sir.

Q. In other words you would have a very difficult time (T. 637) supporting your thesis that Ashland should be removed from the Maryland market if in fact they are an aggressive price setter? A. That is right.

Q. What is so bad about being a price follower that in effect meets the lowest gasoline price anywhere in the State? What is so onerous or so offensive about that conduct that justifies divorcement legislation which pushes a pro-competitive factor out of the Maryland market? A. Oh, obviously the meeting of a price is not bad. To lose the whole law in order to protect this one kind of situation strikes me as being bad because the law will preserve the right of this price cutter to play with price and it will tend to maintain the supply of gasoline available to him.

Q. Professor Patterson, I'm talking to you about maintaining the whole law. I'm asking you as a professor of economics what is so offensive and onerous about meeting the lowest gasoline price posted anywhere in Maryland that would justify excluding a competitor from the Maryland market? A. In that case I would have to say that would be one of the costs of the legislation. It is a cost benefit analysis ultimately that each piece of legislation is going to have some negative consequences and it's going to have some positive; and I would say that that would have to fall on the negative (T. 638) side of the ledger if in fact it was as you've characterized it.

Q. If you were charged with the assignment of drafting legislation such as we're faced with here today and had the authority to cast it as you choose, would you not exclude independent–

(Mr. Woodstock) Objection, Your Honor.

Q. –refiners from the market?

(Mr. Woodstock) I don't believe the witness has been qualified as legislative draftsman.

(Court) No, he's being asked as an economist as I understand it.

(Mr. Drogula) That's correct, Your Honor.

Q. Do you understand the question? A. I understand the question. I wouldn't have drafted the law as it is drafted now.

Q. You would have excluded Ashland and other independent refiners, is that right? A. Well, I would have tried to define it in a different way.

Q. All right, you would have defined it in such a way that a retailer-refiner who is behaving in a pro-competitive manner in the industry could remain in the state and operate its stations, is that a fair statement? A. Well, you've created a hypothetical situation and (T. 639) if you, you know, accepting the premises of that hypothetical situation, I'd have to go with you; but I think it would be very awkward again to figure out how to define operationally this question of being in the crafts of price aggressive versus price taking from the standpoint of administration of the statute. You might have to go other ways to do that.

Q. Are you familiar with the piece of legislation that has passed the United States Senate and presently is pending in the House– A. That's 323?

Q. That is correct which would also limit the ability of certain stations to expand company operated opera-

tions? A. I have looked at a draft of that. I'm not—unfortunately I haven't looked at it lately and so—

Q. Well are you aware of the fact that as drafted that legislation contains the specific exclusion for independent-refiners? A. I'm sorry I do not remember that, but I would accept that as fact, certainly.

Q. Well, you don't have—I don't ask— A. Oh.

Q. —you to accept it. Now Mary Hudson testified yesterday that she was not in favor of the legislation because she wants to build a refinery. Do you recall that testimony? (T. 640) A. Yes, sir.

Q. And she wants to build a refinery, I believe she said, because of her experiences during the energy crisis which she had a lack of supply. Do you recall her saying that? A. I recall her saying that.

Q. You would consider that to be a rational and sensible decision for a marketer like Mary Hudson to want to build a refinery? A. It depends on whether she sees the future without this legislation and we're really talking only about Maryland, not on a Federal level, but if there is no change in the United States with respect to these forces which are tending to dampen intertype competition, I think she's sensible to go that way.

Q. Well, you certainly couldn't criticize her, could you, for wanting to assure her source of supply by building a refinery? A. No, though I think if changes are made, it would be an imprudent direction and that company has no experience in this scenario; and I think they'll have trouble.

Q. Do you consider her decision to build a refinery if in fact she carries it out and to therefore expand the United States refining capacity and to make more supplies available, is that a pro-competitive development? A. Yes, sir.

(T. 641) Q. Now let's assume, if I may, that Miss

Hudson has succeeded in building her refinery and it is operational or as they say in the industry onstream, is she not then precisely the same kind of company as Coastal States and Commonwealth and Ashland in the sense that she is a refiner-marketer? A. She would be. I don't know about the Coastal States marketing. Do they retail?

Q. Yes, they do. In other words she's crude deficient and the three companies I've mentioned are crude deficient. A. Yes, sir.

Q. They all have refineries, is that correct? A. Yes, sir.

Q. And they all engage in marketing assuming as I've said that Coastal States does also, if you believe it's pro-competitive for Miss Hudson to build her refinery and that she should be permitted to operate it, do you think that this law has any economic justification if it would then require her immediately to sell her company operated stations? A. Well, again it's going to have complex effects. It's going to—if this were widespread instead of involving only five stations, it might dampen her enthusiasm to become a refiner. I assume with only five stations, it will not.

Q. Mr. Patterson? A. Yes, sir.

(T. 642) Q. In your opinion as an expert economist, do you believe that a law that would require Mary Hudson upon completion of her refinery immediately to divest herself of her company owned stations makes sound economic sense? A. The law does not require her to do that. It only requires her to not operate them with employees.

Q. In your opinion do you think that a law that would require her to seek—to sell gasoline directly in the State of Maryland upon construction of her refinery is consistent with sound economic principles? A. Taken in that narrow framework, I would say no.

Q. You would say what? A. Say no. Given that specific, limited set of consequences, I would say it is not pro-competitive, but there are other consequences of this law which are pro-competitive and when taken in balance, it seems to be the balance is in favor of competition even though it restricts the operation of the five Hudson stations in the state.

Q. If your opinion is that Mary Hudson should be permitted to operate her company stations in conjunction with her refinery, on what basis do you justify denying Ashland, Commonwealth and Coastal States the same right? A. Well, I'm not going to permit her—I wouldn't make an exception for her. I'm saying that the fact that she would (T. 643) have to divest, that is not operate with employee stations, would be on that law unless someone else took that over, but there will be positive dimensions to this law which will promote competition.

Q. Can you think of any economic reason if you were to consider Miss Hudson's situation in a vacuum by itself which would support Chapter 854 of the Laws of Maryland? A. If I'm only looking at the consequence of the law on Mary Hudson and her behavior, I would say that that essentially is negative. It does not increase competition.

Q. And it's negative as it applies to Ashland, too, does it not? A. Taken only with respect to Ashland and their operations in the State of Maryland.

Q. And it's negative as to Commonwealth, is it not? A. That's right.

Q. And it's negative as to other crude deficient independent refiners similarly situated to those companies? A. I—once you begin to put them altogether now, you begin to deal—I think the critical may have changed it slightly because now we're talking about a trend toward balanced integration which may mean that the

availability of product would be less. Mrs. Hudson coming in is a net gain in refining capacity. That is going to—she's not going to be (T. 644) able to sell all of her product to her stations, her directly operated stations, therefore, that's an improvement in the competitive situation but now if you permit all of the independent or nonintegrated crude deficient refiner-marketers to continue to grow in the direct marketing sense, it's going to be growth as the expense of gasoline available to the price marketers and we're talking about it over a period of time and on a broad scale, that is going to harm competition.

Q. Do you have any evidence to back that upon or is that your theory as an economist? A. That's a theory about how this process will unfold.

Q. I thought you said a moment ago that the independent refiners, Professor Patterson, were pro-competitive. A. They have been and they are but it's because of their—the fact that an Ashland according to the testimony yesterday now sells sixty percent of its output to the unbranded market.

Q. Did you hear Mr. Luellen say yesterday that Ashland is heavily inclined in fact that it must continue to sell to independent marketers? A. But he also said that he would prefer to go the other way.

Q. Did you hear him say or did you not hear him say that Ashland needed to maintain a balance and that in fact (T. 645) they have maintained that balance? A. I agree that's true that they have sloughed the variability off onto the unbranded marketer.

Q. And is it correct that there are ample gasoline supplies available today? A. To this day, I mean, there were not earlier this year.

(Mr. Drogula) I have no more—further questions, Your Honor.

(Mr. Reid) I have one question I'd like to ask.

CROSS EXAMINATION

By Mr. Reid:

Q. Dr. Patterson, how do you reconcile your answer to Mr. Drogula's question relating to a number of independent refiner-marketers with the statement in your book, COMPETITION LIMITED, "Vertical integration between refining and marketing without the market buyer which exists in the crude oil production level poses no serious anti-competitive consequences?" A. Because I think things have changed since that book was written. I mean that as the structure of the gasoline industry and prior to 1972 was one of surplusses of product and many of the Mary Hudsons were buying gasoline at marginal costs which were substantially less than the average cost of producing gasoline. With the change in that industry the whole question of the availability of supply now becomes much larger. (T. 646) It enters into the competitive effectiveness of these types of actors in the system; and that's happened since the shortage of—when we went to a hundred percent MER and in the spring of '72 and since then the whole economics of that industry changed, that is of the crude supply refining sector of the industry; and that changes the relationship then of these type of actors through the availability of supply to the price marketers.

* * * * * *

(T. 647) (Court) Professor, there's one statement you made that seems to puzzle me somewhat. Now we were talking about the situation of the Mary Hudsons and the Commonwealths and various others who were price marketers and they now start to integrate and they produce or they refine but they're crude deficient? A. Yes, sir.

(Court) And you said if you got too many of those, it would tend to, as I understood you to say, tend to lessen

the supply of gasoline available. Did you say that? A. The argument is something like this that Mary Hudson is not now a refiner. Were she to enter refining as well as (T. 648) marketing, that would increase the supply of gasoline available because the amount of gasoline she'd been buying the past from others would now be made available to the unbranded market and she would be producing; but as you begin to exempt not only her now but then you begin to add the Careos and the Ashlands and so on and you permit them to expand their direct options they're going to be taking gasoline away from the Mary Hudson or in this case Mary Hudson is no longer a price marketer, she's an integrated refiner so let's talk about her brother, Fisca, going to be taking gasoline away from him and routing it through your own controlled, owned directly operated outlets; and to that extent the exemption of the independent refiner-marketer would lessen competiton.

(Court) But isn't it so that these crude deficient refiners also have to have an independent market to maintain their efficiency? A. They sell whatever they're not able to direct to their own clients.

(Court) So we have a proliferation of these independent refiners and they have gasoline left over which they can't use through their own controlled dealership and that becomes more on the market, doesn't it? A. Yes, sir and that makes it pro-competitive.

(Court) That makes it pro-competitive. (T. 649) A. Yes, sir.

(Court) Well, isn't that what you want? A. I do, but the point is if they increase the number of outlets now not refineries, but outlets, that they control themselves, then they'll be withdrawing surplus gasoline from the spot market and running it through their own outlets and that is—

(Court) Well, when does the time arrive when they never reach the situation where they have surplus gasoline, can you say that? A. Well, it would be reached when their—the volume through their own outlets equalled the refining capacity that they own.

(Court) Have you ever known that to— A. No, sir, no. This is a prospect. This is not a—

(Court) What is the likelihood of the prospect? A. Well, if—I don't see it as terribly unlikely, sir, because the—we have a situation where there will be a growth in direct marketing. It isn't a short-term prospect but it is certainly part of the forces that work here.

(Court) But if there's going to be a surplus from the independents available to the marketers and they're anxious to sell that, isn't that good for the man on the street (T. 650) who's driving around in his car? A. Yes, sir, that's exactly the surplus that I want to preserve by and I think this law does preserve that surplus. It prevents that capacity from being directed through an increased number of integrated outlets. So it says that if Ashland—

(Court) But doesn't the law of supply and demand have any part to play in this situation, where you get a surplus of a product, isn't the price apt to decrease? A. Yes, sir; and that's exactly the advantage that the price marketers in the past have exploited and they have gotten gasoline cheaper and they have passed it on in the form of increased discounts that have tended to bring the price structure of the market down.

(Court) And yet you're telling me if we proliferate the independent refiners who have surplus gasoline to sell that's somehow— A. No, sir, I'm not saying proliferate the refiner. I'm saying if Ashland now has—I've forgotten the number, twenty outlets in Maryland.

(Mr. Drogula) Seventeen.

A. Seventeen, if they now go to seventy-five outlets in

Mryland, much of the gasoline that they were now selling to the Hudsons and to the Sears and to the Wards and these (T. 651) others will be withdrawn from that market and channeled through their own outlets and—

(Court) You're assuming then that the status is going to remain forever quo and, therefore, there's not going to be any Mary Hudsons coming into the picture. A. Well, there's great difficulty, sir, and as the questions I think of the attorney from Ashland have pointed out that operating a refining system without, you know, clear, favorable access to crude is a tough proposition and it's not an attractive proposition that invites a number of investors to come in. We look at the—

(Court) I realize that, but you've told me that if we have a proliferation of these independent marketers who go into refining and, therefore, have gasoline left over, that that's going to drive the market out. I just don't understand it. A. No, I don't say that at all. Mary Hudson's moving into refining will increase the supply of gasoline and will be pro-competitive. I quite agree with you there.

(Court) But you said if it went on beyond that and we had— A. No, I'm speaking of the other direction. Given now no increase of the refining capacity but now an increase in the controlled gallonage that moves through direct outlets, (T. 652) that would reduce the supply of gasoline available to price marketers.

(Court) All right. A. It moves it from type of outlets who cut price to outlets who follow the price.

(Mr. Drogula) Your Honor, may I ask a question or two along those line?

(Court) Yes.

FURTHER CROSS EXAMINATION

By Mr. Drogula:

Q. Doesn't your analysis, Professor, assume as you've just indicated that there will be no corresponding increase in refining capacity? A. It does.

Q. Would you have any facts to justify your opinion, if it is your opinion, that Ashland Oil has not and will not continue to increase its refining capacity? A. I–I–no, sir.

Q. Are you aware of the fact that the Ashland Oil Company has doubled its refining capacity in the last seven years? A. I'm not aware of the figure. I do know that there is expansion at the Kentucky facilities, I know that.

Q. Are you not aware of the fact that through this same period of time Ashland has continued the same percentage (T. 653) of selling approximately sixty percent of its supply to independent marketers like Mary Hudson? A. I don't know that. That's not information that's been available to me in the past and–

Q. But you testified to–if it is a fact that independent refiners as they proliferate and as they continue to operate their company stations, expand their refining capacity so that they can both serve their own outlets and continue to serve independent marketers, then there are no anti-competitive effects, are there? A. As long as the supply would increase, that would meet the objection I have, yes, sir.

Q. So that your whole thesis depends upon your assumption that independent refiners are not going to be expanding their refining capacities commensurate– A. It's predicated on the notion that they will not expand the proportionate output that they direct to their own channels.

Q. But you have no fact– A. That they will–my

impression is–my projection is that the trend in the future as a result of the changed structure of the industry will cause firms which had previously sold on the wholesale market to try to sell more to their own outlets, for firms which is sold to dealers to try to sell (T. 654) now more through employee run outlets, that the direct operation of stations as a part of a response to the change in the economic structure of the oil industry which has been taking place in the last three years.

Q. Are you familiar with the section of the pretrial order which shows that Ashland has fewer company operated stations today than it did six years ago? A. I've read the pretrial order. I don't remember that specific fact.

(Mr. Drogula) I have no further questions, Your Honor. Thank you.

(Court) All right, sir, you can step down, thank you.

(Mr. Woodstock) Your Honor, the State had originally intended to call a fourth witness, Dr. Albert Page, but in light of the ruling on Paragraph D and upon review of the deposition testimony, we feel we're unable to call him to testify in the remainder of these proceedings.

(Court) All right, sir.

(Mr. Woodstock) The only remaining thing we have would be the introduction of certain parts of the deposition (T. 655) of the BP Oil Corporation which we reserved the right to do, as you recall, when the Plaintiffs introduced their pages.

(Court) All right, sir.

(Mr. Woodstock) And I'm halfway through reviewing them with their counsel and perhaps if we can take a brief recess, I can finish up on that and come back and do that; and I think we'll be in a position to rest.

(Court) All right, will you let me know when you're prepared to proceed?

(Recess)

(Mr. Woodstock) May it please the court, the State will proffer the BP-the deposition of BP Oil Corporation in its full form with the stipulation and understanding of the parties that those portions relating to price supports are not to be considered as being introduced.

(Court) Can you give me those pages, sir?

(Mr. Woodstock) If Your Honor would allow me, I could do that over the weekend and provide it Monday.

(Court) All right.

(Mr. Woodstock) It's quite a job of dissecting it.

(Court) What I meant was that the pages involving the price support testimony, otherwise you want me to read the whole thing, I take it.

(Mr. Woodstock) What I'd like to do if it's (T. 656) agreeable with the court is—and the Plaintiffs, provide the court with a lined out copy of that portion of the testimony dealing with price supports.

(Court) All right.

(Mr. Noonberg) That's perfectly okay with us, Your Honor.

(Court) All right.

PLAINTIFFS' EXHIBIT NO. 3

KAYO OIL COMPANY
MARYLAND STATIONS

Station	Date Opened	Present Status
Salisbury, Maryland	6/ 7/64	Open
Fruitland	8/ 1/64	Open
Baltimore-Park Heights	8/23/64	Open
Baltimore-York Road	9/27/64	Closed
Baltimore-Belair	11/10/64	Open
Baltimore-Preston	11/12/64	Closed
Hagerstown	11/19/64	Open
Baltimore-Liberty	11/19/64	Closed
Pulaski	11/21/64	Closed
Baltimore-Montebello	11/ 6/64	Open
Baltimore-Fayette	11/25/64	Open
Baltimore-Remington (W. 29th St.)	12/16/64	Open
Silver Spring	1/ 1/65	Closed
Cambridge	3/17/67	Open
Lexington Park	3/28/69	Open
Finksburg	6/18/69	Open
Baltimore-Ft. Smallwood	6/ 2/72	Open
LaVale	3/10/72	Open
Cumberland	6/29/73	Open

PLAINTIFFS' EXHIBIT NO. 4

AFFIDAVIT OF
GEORGE W. RUPPERSBERGER

In the Circuit Court for
Anne Arundel County

Equity Nos. 22,461, 22,069, 22,091, 22,216,
22,501, 22,562 and 22,551

Gulf Oil Corporation, et al.,
Plaintiffs,

v.

Marvin Mandel, Governor, et al.,
Defendants.

George W. Ruppersberger, being duly sworn upon oath, deposes and says:

If I were called as a witness in the trial of this action, I would testify as follows:

1. I have had more than 39 years of experience as an employee of Gulf Oil Corporation ("Gulf"). My experience has included virtually all phases of the marketing of petroleum products, including but not limited to service station retailing. By virtue of this experience, I am thoroughly familiar with Gulf's policies and practices of petroleum marketing.

2. I am presently the Director of Retail Marketing, Eastern Region, of Gulf Oil Company, U.S., a division of Gulf Oil Corporation, and have held this position since November 1, 1970. Gulf's eastern region consists

of 16 states, including Maryland, Delaware, Pennsylvania, Virginia and West Virginia plus the District of Columbia. My duties include the supervision of distribution and marketing of gasoline and other petroleum products in the eastern region. My areas of responsibility are sales, promotion, business development, self serve activities, acquisition of new dealers, the development of additional stations, the granting of temporary competitive allowances, and, generaliy, all areas relating to the marketing of petroleum products.

3. In addition to my duties with Gulf, I am chairman of the Philadelphia Governmental Affairs Committee of Pennsylvania Associated Petroleum Industries. Basically, this Committee is engaged in

Also, I am a member of the Gas and Oil Group – National Defense, Executive Reserve. This Group is engaged in

In connection with this Group, I have been appointed manager for petroleum for the State of Delaware in the event of an emergency.

4. Prior to assuming my present position as Director of Retail Marketing, I was Gulf's district sales manager in Philadelphia, Pennsylvania. I held this position for approximately four years. My duties included the supervision of the distribution and marketing of gasoline and other petroleum products for Gulf's Philadelphia district.

5. Prior to becoming Gulf's district sales manager for the Philadelphia district, I was Gulf's district sales manager in Baltimore, Maryland. I held this position for approximately three years. This, too, involved the supervision of the distribution and marketing of gasoline and other petroleum products.

6. Other positions which I held for Gulf have included assistant manager for the Baltimore district, Baltimore City sales manager, real estate representative and real estate supervisor for the Baltimore district, sales representative in the metropolitan Baltimore area, service station manager, assistant service station manager and, initially, service station attendant.

7. As set forth in paragraph 13 of the Pretrial Order, Appendix B – Stipulated Facts Concerning Gulf Oil Corporation, Gulf has a wide variety of retail gasoline outlets in Maryland. This variety of retail gasoline outlets in intended to satisfy consumer demand and to be competitive.

8. Gulf continuously evaluates whether its outlets are satisfying consumer demand. The basic consideration in determining whether an outlet is satisfying consumer demand is whether a sufficient volume of petroleum products is sold at the outlet to support a dealer and/or return a profit to Gulf. From time to time, even if an outlet were not to return a profit to Gulf, but maintained a sufficient volume to support a dealer, Gulf would permit the operation to continue in order to maintain Gulf's market representation.

9. As set forth in paragraph 16 of the Pretrial Order, Appendix B – Stipulated Facts Concerning Gulf Oil Corporation, Gulf presently anticipates owning and operating 23 retail gasoline outlets in Maryland. Twenty-two of these outlets are planned to be phased in over a five year period and one is already in operation. All are intended to be self service operations. This is predicated upon Gulf's belief that in today's relatively high priced retail gasoline market, many consumers prefer the lower price gasoline available at

self service operations, as well as the efficiency and speed which some consumers derive, as opposed to having to wait for a service station attendant to become available.

10. Gulf believes that the 23 self service stations presently anticipated represent a fair response to consumer demand. These 23 stations are planned to be company operated, because, in Gulf's view, there are a number of advantages in company operated stations, including the following:

(a) Greater efficiency.

(b) Control of the hours of operation and level of service.

(c) Ability to promptly and competitively respond to price changes in the market.

(d) Lower costs to the consumer, enhancing Gulf's ability to effectively compete.

(e) Experimentation with innovative competitive marketing techniques, e.g., tool rentals, sale of miscellaneous items such as home and garden supplies, ice and milk.

(f) High standards of service and cleanliness.

(g) High standards of design and generally attractive appearance.

(h) Fast "no frills" sales.

11. Certain of the advantages of company operated stations become particularly important in times of gasoline shortage. For example, with company operated stations, Gulf can quickly and effectively stagger the hours of operation of its company operated stations, in order to lessen hardship to the consumer in not having

gasoline available during such "off hours" as late evenings and Sundays. Without company operations, control over the hours of operation of retail outlets is more difficult, since, generally, Gulf's independent dealers have the option to sell their allotted supplies quickly and curtail operations, thereby reducing their hours of work and business expenses.

12. A recent example of innovation through a company operated retail gasoline outlet is the "Tire Hut" operation, which has been opened in Gulf's Philadelphia District. Essentially the "Tire Hut" is a discount auto, home and garden center where gasoline is also marketed. This operation commenced at company owned and operated outlets, and has since evolved into an operation whereby Gulf operates the auto, home and garden business, and an independent dealer operates the gasoline pumps. Gulf's early experience with the "Tire Hut" operation has shown it to be a highly effective technique in gasoline marketing, and intends to commence "Tire Hut" operations in Maryland. A picture of one of the "Tire Hut" outlets in Philadelphia is attached as Exhibit 1 hereto.

13. Although, as demonstrated above, company operations can be a highly effective marketing technique, Gulf views company operated retail outlets as one alternative marketing technique to be employed in accordance with consumer demand. Gulf does not view company operations as an exclusive marketing technique, and has no plans to employ the company operated retail outlet as an exclusive marketing technique. Gulf presently intends to employ company operated retail outlets in approximately 10% of its retail outlets, both nationwide and in Maryland.

14. I believe that it is important for Gulf to keep open its option to employ company operated retail outlets as a marketing technique, because, in this

manner, I believe that it can best serve consumers and itself. If Gulf is limited in the manner in which it can market gasoline, its ability to respond to changes in market conditions and to attempt marketing innovations, such as "Tire Hut", is restricted; and the consumer loses the benefit of potentially lower gasoline prices. The only way that Gulf can effectively ascertain consumer demand is to offer different styles of marketing, services and products to the consumer. If this flexibility is denied, Gulf will be unable to ascertain consumer demand in the most effective manner. Therefore, any restriction upon company operation will be a disservice to the consumer, in my opinion.

15. In addition to the foregoing, I believe that the elimination of Gulf, as well as other vertically integrated oil companies, as an element of competition in the retail gasoline market can only be harmful to the consumer. In my opinion the consumer is best served by a wide variety of entities competing in the retail gasoline market, because the wider the variety the greater the competition. Conversely, restricting this variety, as do Paragraphs B and C of the challenged legislation, restrict competition.

16. In my opinion, Paragraphs B and C of the challenged legislation are vague and ambiguous, insofar as they refer to "producer" and "refiner" of petroleum products. I have been informed by Gulf's attorney that certain issues concerning these terms have been presented to the Court in a Motion For Partial Summary Judgment, filed August 6, 1975, together with supporting affidavits and memoranda. Such pleadings are incorporated herein by reference.

17. If Gulf is forced to divest its present company operated station in Maryland, there is, in my opinion, a high degree of risk that its value will be diminished. Such risk lies in the uncertainty of being able to find a qualified dealer to operate the station and to retain or develop business. The forced sale or lease of Gulf's company operated station, in my opinion, would reduce Gulf's bargaining leverage in securing a qualified dealer.

18. Under certain market conditions, Gulf grants temporary competitive allowances to its branded retail dealers. Gulf's purpose in granting such allowances is to provide competitive and equitable assistance in gasoline prices to Gulf dealers who are injured by local competitive gasoline price reductions of competing retails which are subsidized by their suppliers.

19. Temporary competitive allowances are granted within competitive trade areas in Maryland and surrounding states. Generally speaking, a competitive trade area is a geographical area containing one or more Gulf dealers who are affected to a similar degree by the same set of competitive circumstances. As a general rule, Gulf dealers located in a given competitive trade area will be granted the same temporary competitive allowance, in order to enable Gulf to meet competition. The number of Gulf retail dealers falling within any competitive trade area varies depending upon competitive conditions. Similarly, the geographical boundaries of a competitive trade area change from time to time, depending upon competitive conditions. Also, a competitive trade area is not limited to a particular state, and, in fact, frequently crosses state lines.

The same competitive trade area may include portions of Maryland and the District of Columbia. For example, a Gulf station located at 9501 Georgia

Avenue, Silver Spring, Maryland, was at times located in the same competitive trade area as a Gulf station at 7812 Georgia Avenue, Washington, D.C. Similarly, a competitive trading area in the Hancock, Maryland area extended along U.S. Route 522 from Warfordsburg, Pennsylvania, through Hancock, Maryland, to Berkley Springs, West Virginia.

20. Gulf has not granted temporary competitive allowances in Maryland since February, 1973. At the time that temporary competitive allowances were being granted, Gulf's policy and practice were to grant such allowances within competitive trade areas and not on a statewide basis.

21. When Gulf grants a dealer a temporary competitive allowance, it does not, directly or indirectly, secure the dealer's agreement that the allowance will be reflected in a lower retail price. Whether the dealer will account for his lower cost resulting from the allowance by reducing his retail price is a decision solely within his discretion.

22. In my opinion the uniform allowance required by Paragraph D of the challenged legislation would be detrimental to both the Maryland consumer and the independent service station dealer and would discriminate among suppliers of gasoline. Paragraph D would make it economically prohibitive for Gulf to grant temporary competitive allowances, because such allowances would have to be granted to each of the 218 independent Gulf dealers in Maryland. Therefore, Gulf probably would not grant any temporary competitive allowances. This would adversely affect the consumer, who, absent such allowances, will not reap the benefit of lower prices ordinarily generated by such allowances. This would also affect Gulf's independent dealers, who

would not receive allowances to help them meet competition supported by their competitors' suppliers. Therefore, such dealers either would have to reduce their profit margin in order to meet local competition, or maintain competitively high prices, thereby risking a loss of their share of the local market.

23. The challenged legislation also discriminates in favor of petroleum suppliers who supply a relatively small number of retail outlets in Maryland. Such suppliers would not find it economically prohibitive to grant temporary competitive allowances to their relatively small number of outlets. Since the major oil companies, such as Gulf, would find the granting of such allowances economically prohibitive because of Paragraph D, they are the objects of discrimination.

24. In my opinion the term "voluntary allowances", as set forth in Paragraph D, is vague. From time to time Gulf grants its dealers retail abatements, e.g. in the event of a service station revamp or rebuild, traffic disruption due to street repairs, temporary road closing and sewer installation. It is not clear whether the term "voluntary allowances" set forth in Paragraph D covers such rental abatements. If such abatements are considered to be voluntary allowances, Paragraph D would require the extension thereof throughout the state. Obviously, this would be economically prohibitive; and Gulf would not grant any relief to the dealer. Therefore, Gulf's independent dealer who, absent Paragraph D, would receive assistance would, in the absence of assistance, sustain a possibly serious loss.

25. Gulf leases or subleases a substantial number of properties to independent dealers to operate as retail gasoline outlets. Certain equipment is ordinarily included in the lease of a fully equipped service station

facility, e.g. pumps, tanks, lifts, lights and air compressors. Such equipment is included in the lease rental, without any apportionment for the equipment. The equipment ordinarily is not a factor in ascertaining the rental. Rather, the underlying consideration in determining what rental should be charged for a given property is the value of the property as commercial real estate used as a retail gasoline outlet. A wide variety of considerations enter into the determination of value, such as location, costs of property, size and attractiveness, visibility and local regulations.

26. Paragraph E of the challenged legislation requires uniform "equipment rentals" without defining the term "equipment rental". Therefore, it is not clear whether that term includes equipment such as described in paragraph 24 above, which ordinarily is included within a lease agreement without any separate apportionment. In my opinion, therefore, the term "equipment rentals" is vague and ambiguous.

(Notarized) /s/ George W. Ruppersberger.

PLAINTIFFS' EXHIBIT NO. 8

AFFIDAVIT OF ROBERT G. KELVEY,
VICE PRESIDENT, REAL ESTATE
PETROLEUM MARKETING CORPORATION

In the Circuit Court for
Anne Arundel County

Equity No. 22,069

Petroleum Marketing Corporation,
Plaintiff,

v.

Marvin Mandel, Governor et al.,
Defendants.

State of Virginia, County of Fairfax, ss:

I HEREBY CERTIFY, that on the 14th day of October, 1975, before me, the subscriber, a notary public of the State of County aforesaid, personally appeared Robert G. Kelvey, and made oath in due form of law, as follows:

1. To date, I am the Vice President of Real Estate of the PETROLEUM MARKETING CORPORATION and am responsible for all of its real estate investments, activities, and more particularly, for the twenty-one "SCOT" service stations, real properties and leased as well as improvements thereto, in the State of Maryland.

2. In response to Defendants' Interrogatory No. 23, (attached as Exhibit A), Petroleum

Marketing Corporation ("PMC") provided certain investment data respecting the PMC real properties, leases, and improvements in Maryland. I hereby certify that the same data is a true and correct summation of the cost of PMC investments in such real properties, leased properties, and improvements at the time of their agreements of leasings, the same totaling $2,043,710.00.

3. Further, Exhibit B, also attached to this Affidavit, sets forth in net book value of the investments described above, as of September 30, 1975, the same totaling $1,328,083.00.

4. I make all of the aforesaid statements based upon my personal knowledge of the information therein and am competent to testify about all of PMC's real estate investments, including those in the State of Maryland.

(Affidavit) /s/ Robert G. Kelvey.

Affidavit - R.G.Kelvey
Exhibit A

Petroleum Marketing Corporation

Interrogatory #23: State your investment separately in land, building and equipment for the company-operated Petroleum Marketing Corporation stations. Do not include any inventory of salable products or items. List all the specialized equipment found in a Petroleum Marketing Corporation company-operated station which would not be found in a Petroleum Marketing Corporation leased dealer station.

Response to Interrogatory #23:

Station	Owned (O)/ Leased (L)	Land	Building	Equipment	Total
MD 001	L	--	9,753	19,967	29,720
MD 002	O	76,628	21,789	15,608	114,025
MD 003	O	40,576	46,325	23,569	110,470
MD 004	O	45,496	29,452	17,515	92,463
MD 005	L	--	22,051	17,482	39,533
MD 006	L	--	38,074	12,848	50,922
MD 007	O	201,535	60,327	29,215	291,077
MD 008	O	39,512	30,715	19,171	89,398
MD 009	L	--	26,103	29,100	55,203
MD 010	L	--	81,769	29,943	111,712
MD 011	L	--	35,469	16,322	51,791
MD 012	L	--	--	10,341	10,341
MD 013	L	--	21,854	25,965	47,819
MD 015	O	132,764	66,501	29,619	228,884
MD 016	O	44,845	29,143	16,199	90,187
MD 018	O	142,191	71,572	29,097	242,860
MD 019	L	--	28,006	37,243	65,249
MD 020	L	--	9,750	17,426	27,176
MD 021	O	81,647	45,375	21,730	148,752
MD 022	L	--	94,072	32,520	126,592
MD 023	L	--	4,000	15,536	19,536
Totals		805,194	772,100	466,416	2,043,710

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Affidavit - R.G.Kelvey
Exhibit B

Station	Owned (O) Leased (L)	Land	Net Building	Net Equipment	Total Net Book Value As Of 9/30/75
MD 001	L	--	-0-	4,117	4,117
MD 002	O	76,628	2,628	1,681	80,937
MD 003	O	40,576	21,961	3,102	65,639
MD 004	O	45,496	-0-	2,474	47,970
MD 005	L	--	-0-	4,972	4,972
MD 006	L	--	10,108	896	11,004
MD 007	O	201,535	39,761	12,218	253,514
MD 008	O	39,512	99	5,226	44,837
MD 009	L	--	-0-	2,758	2,758
MD 010	L	--	63,661	17,197	80,858
MD 011	L	--	319	4,468	4,787
MD 012	L	--	-0-	564	564
MD 013	L	--	17,010	14,819	31,829
MD 015	O	132,764	41,894	10,713	185,371
MD 016	O	44,845	678	5,125	50,648
MD 018	O	142,191	50,427	12,961	205,579
MD 019	L	--	21,554	21,998	43,542
MD 020	L	--	-0-	4,327	4,327
MD 021	O	81,647	-0-	3,008	84,655
MD 022	L	--	80,552	24,274	104,826
MD 023	L	--	3,213	12,136	15,349
Totals		805,194	353,865	169,034	1,328,083

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PLAINTIFFS' EXHIBIT NO. 10A

The Honorable Eugene M. Childs
Judge
Circuit Court for Anne Arundel
County
Courthouse
Annapolis, Maryland 21404

Re: Shell Oil Company, et al. v. Marvin Mandel, Governor, et al., Equity Nos. 22,216, 22,069, 22,091, 22,461, 22,502, 22,551, 22,562

Dear Judge Childs:

Enclosed is a copy of the Affidavit of Walter D. Naughton and attached exhibits which were filed today with the Court.

The affidavit and attached exhibits of Mr. Naughton, Area Manager for the Southeast Area of Shell Oil Company, are being offered as evidence in Shell's case-in-chief in this action. The enclosed affidavit and exhibits were filed in lieu of either direct or cross-examination pursuant to an agreement reached between counsel for Shell and counsel for defendants, as a result of Your Honor's endorsement of such a procedure on August 22, 1975.

Sincerely yours,

/s/ William Simon
Counsel for Plaintiff
SHELL OIL COMPANY

/s/ John A. Woodstock
Counsel for Defendants

Enclosure

PLAINTIFFS EXHIBIT NO. 10C

In the Circuit Court for
Anne Arundel County

Shell Oil Company, et al.,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

County of Harris, State of Texas

Equity Nos. 22,216
22,069, 22,091, 22,461,
22,502, 22,551, 22,562

COUNTY OF HARRIS)
) ss:
STATE OF TEXAS)

AFFIDAVIT OF WALTER D. NAUGHTON

WALTER D. NAUGHTON, being duly sworn upon oath, deposes and says:

If I were called as witness in the trial of this action, I would testify as follows:

1. I am the Marketing Manager for the Southeast Area of Shell Oil Company. My responsibility involves

all aspects of retail marketing in the Mississippi to Pennsylvania corridor, including the State of Maryland. As a result of almost 27 years of experience, largely in marketing, I have had the opportunity to progress through various senior assignments with Shell Oil Company. Over the years, assignments such as District Sales Supervisor, Division Retail Manager, District Manager, Manager of Head Office Market Development Division, and my present assignment as Marketing Manager have provided an extensive background in service station retailing and other aspects of petroleum marketing. I believe that my knowledge and operational skills qualify me to render appropriate evaluations of gasoline marketing concepts and consumer attitudes in general, and with respect to the Maryland market in particular.

Paragraphs B and C of the Maryland Act – Company Operated Stations

2. The needs and desires of the consumer of gasoline and other retail petroleum products and related services vary greatly, ranging from those who will sacrifice all service in order to obtain products more quickly and inexpensively to those who wish all traditional amenities or extraordinary and consistent product quality, service and repair availability. In order to satisfy these consumer demands, there is a wide range of approaches to marketing products at the retail level. Some companies operate through stations which furnish complete automotive service, others market only gasoline and motor oil. Retail stations may be either full self-service or operations where attendants fill the customer's tank. Other stations combine retail gasoline sales with car wash and urban convenience grocery stores. The trend in the last decade has been to

multi-pump islands, high volume stations, yet there still remain many single-pump island grocery stores or restaurants which sell gasoline.

3. Gasoline retail operations can be classified basically into company operations, which are run by the company with a manager, and dealer operations, which are controlled by independent businessmen. Like a company's operation of its station, a dealer makes independent decisions concerning his operation. A dealer, for example, determines what products will be stocked and sold, the range of mechanical services to be offered, and the prices he will charge for his goods and services. Although company representatives may act as counselors to these independent entrepreneurs on matters ranging from financial management to manning, offering advice based on market research and business experience gained both through company operated stations and marketing techniques found to be successful by independent dealers, a dealer is free to accept or reject such advice.

4. Retail gasoline marketers consist of companies like Shell, which are sometimes referred to as "major" brand companies, companies such as Petroleum Marketing Corporation, which are sometimes denominated "private" brand marketers, traditional chain merchandisers like Sears and individual marketers that may operate only one station and who may purchase gasoline on the "spot" market. Competition in the gasoline marketplace results from the operations of all such marketers and such competition is based upon the marketing style of each particular operation, which, of course, can vary in terms of the total range of consumer needs and desires.

5. Shell attempts to satisfy, and thus competes for, the full spectrum of consumers. To this end, it has followed the principles of competitive marketing and competitive innovation. Its types of operation, that is the various marketing styles through which it operates, as well as its methods of operation, both dealer and company operated stations, reflect this end. Photographs and descriptions of typical Shell branded facilities are attached hereto as Exhibit 1 and incorporated herein by reference. Improvements in product quality, construction of new and modern stations, modernization of existing stations, training of prospective dealers and managers, development of new merchandising and sales promotion methods, advertising programs, and product distribution through both company and dealer operated stations all contribute to Shell's effort to create an image as well as marketing styles that will appeal to and satisfy the needs of the motoring public.

6. Shell has traditionally operated the majority of its stations with independent dealers, as opposed to company personnel. The incentive of a dealer is more suitable to many operations and it is Shell's policy that its operations should compliment dealer operations in particular, and the marketplace in general. Indeed, it would be both burdensome and impractical for Shell to assume control over and adequately monitor the operation of the approximately 8,900 directly served Shell branded retail outlets. To my knowledge, most "major" suppliers operate a majority of their stations with independent dealers.

7. The operations of independent dealers with respect to the marketing of petroleum products is not only recognized and honored by Shell, but it is

essential to the continued operation of Shell's marketing distribution system. Shell's relationship with its dealers is and has always been of utmost importance to Shell. Indeed, only 384, or less than 5 percent, of the total number of directly served Shell branded retail outlets are company operated. Of the 384 stations, 180 are tunnel car washes, 135 are self serve, 15 are gasoline only, 4 are self repair and 50 are conventional full service stations.

8. Similarly, Shell recognizes the viability of "independent" or "private" brand marketers and it is my opinion that the Maryland Act would adversely affect such operations in the State of Maryland. Furthermore, it is my opinion that the Maryland Act would inhibit the backward integration into refining or producing of those companies whose operations are limited to marketing. Likewise, it would inhibit the forward integration into marketing of small independent refiners or producers.

9. Apart from my belief that all marketers should have the right to participate in the retail marketing of petroleum products, it is my opinion that the consumer is best served by a mix of all types as well as methods of marketing petroleum products. It is my opinion that the elimination of any particular element or source of competition in the marketplace can only have effects which are harmful to the consumer. It is my opinion that Paragraphs B and C of the Maryland Act not only eliminiate one element of competition from the Maryland market, but they will have the effect of insulating and sterilizing that market from the benefits, including economy, convenience, facilities available, standards and quality of service, and marketing developments, that result from such competition.

10. Shell presently serves Maryland retail gasoline and petroleum product consumers directly through one Shell branded outlet which is operated by the company, and through 194 Shell branded outlets which are either owned or leased by Shell and then leased to and operated by independent businessmen, and through seven Shell jobbers. Due to the fact that the latter two methods of operation are conducted by independent businessmen, Shell has no control over the products or services offered to the consuming public through those outlets.

11. While Shell only has one company operated station in the State of Maryland at the present time, it is Shell's policy to constantly assess retail markets in terms of the development of new as well as the implementation of existing marketing techniques. It is Shell's belief that some of the consumer's needs can best be met, in terms of economies or the development or implementation of standards or concepts, through the operation of company stations. It is my opinion that denial of this method of marketing would be harmful to all of Shell's operations and, therefore, the consumer of petroleum products.

12. Shell company operated stations offer direct benefits to the consumer in terms of greater convenience and maintenance of high standards of service and cleanliness. In addition, Shell's innovative stations, certain of which, in my opinion, do not lend themselves to traditional dealer operations, provide a direct benefit to the consumer through cost savings and improved station merchandising and service. Indirect consumer benefits of company operated facilities are realized through Shell's development of innovative marketing techniques and procedures, financial control systems,

and evaluation and utilization of highly specialized equipment. All these consumer benefits evolve, of course, from Shell's commitment to both its company and dealer operated stations.

13. Shell's company operated stations provide a prominent example of the need for and the use of such outlets for testing and developing various innovative marketing concepts. By operating innovative outlets on a company basis, Shell can guage the potential of new concepts and arrive at a realistic analysis of their acceptability to the motoring public. Furthermore, company operated facilities enable the establishment of those standards and procedures necessary to adequately test and evaluate the concept under study. In my opinion, the resulting benefits enure not only to Shell, but also to its independent dealers and the consumer. Company operated stations permit Shell to compete with other suppliers in testing new marketing concepts under realistic market conditions. This, in turn, enables Shell to provide its independent dealers with an established, proven marketing method capable of generating a profit, as opposed to an untested marketing concept that is unknown to the consuming public. In a company station, Shell is able to control and thus to promote a new marketing concept in a specific and positive manner by establishing the price of its gasoline at a price which it deems competitive and ensuring that services are given free or as otherwise advertised; that the attendants wear clean and attractive uniforms and provide quick and courteous service; that the manager of the station has sufficient help; that the station's hours of operation accommodate the motorists in the particular area; and that sound business practices in merchandising are followed. Through experience,

Shell has found that absent the use of new and improved merchandising techniques and practices, both its company and dealer operated stations will lose customers to those stations which satisfy the latest consumer demands.

14. Typical examples of Shell's consumer oriented concepts, including types of retail outlets, which were or are presently being developed through initial testing at company operated stations, are automotive Self-Repair stations, gasoline self-service stations, tunnel car washes, Express Film Stops and AUTOSENSE mechanized diagnostic devices. Attached hereto as Exhibit 2 and incorporated herein by reference is a summary explanation, together with related material, of the manner in which these concepts were developed and introduced to the motorist. Shell, in determining whether the concept was a practical and efficient manner of meeting such a need or desire, was required to develop its concepts under controlled parameters within the actual marketplace.

15. The development and present operation of many of Shell's innovative outlets must be through company employees due to such reasons as high investment and realization of the cost-effectiveness of certain of the marketing concepts. Furthermore, in Shell's opinion, certain types of operation, like Shell's gasoline only facilities, generally do not appeal to the independent dealer since the opportunity for additional revenues from the sale of other products and repair services is not present. This does not mean that all innovative marketing must be continuously operated through company stations. In my opinion, however, it does necessitate that a company like Shell have the opportunity to experiment with its operations in light

of changing circumstances. Experience gained through trial marketing has demonstrated that innovative marketing techniques can be successfully tested only when the supplier plays a direct role in the operations. In light of the diversity of markets and customers, as well as new and ever-changing consumer demands, Shell feels that it can best serve the consumer, its dealers and itself by continuous adaptation of its retail operations to market demands. These facts, in addition to those set forth below, require flexibility in retail marketing. It is my opinion that it would be detrimental to the consumer to freeze marketing techniques in the pattern of yesterday or even today. It is my opinion that the public is better served if it is able to exercise a choice in terms of a mixture of types and a variety of methods of operations in the marketplace.

16. In addition to providing these benefits, Shell believes that company operated stations offer the consumer actual cost savings. Since Shell conventional-styled, company-operated stations price competitively with all other marketers (all "major" and "private" brand retail outlets, whether dealer or company operated), the consumer, in my opinion, may realize actual cost savings in the purchase of gasoline at such stations as compared to similar dealer operated stations. Furthermore, in terms of innovative operations, Shell tunnel car washes may offer wash and wax services either free or at a reduced price with the purchase of a specified amount of gasoline (see Exhibit 2) and Shell Self-Repair stations offer the consumer, at a per hour rate, the necessary tools and facilities to perform his own automobile mechanical work (see Exhibit 2). Likewise, it is my opinion that certain innovative outlets offer reduced costs due to the fact that they

provide the most efficient method of serving the consumer. Full company operated self-service stations, for example, generally require only one employee per shift. Since these people are company employees, they can be supervised by one field representative who moves about the marketplace overseeing operations and performing the administrative and management activities for several stations. In my opinion, this efficiency may manifest itself in reduced prices to the consumer.

17. In my opinion, company operated stations also serve a variety of other purposes which are directed toward the ultimate benefit of the consumer. More specifically, company operated stations have traditionally permitted suppliers like Shell to more effectively respond to the following market demands and conditions:

(a) *Development of New Stations* – In some new or expanding areas of operation, the number of customers may be too small to support an operation by an independent dealer. Accordingly, Shell must retain the right to operate these new stations until sufficient gallonage is achieved to attract a competent operator. This would be particularly true in areas where Shell is not a recognized marketer. In such cases, Shell would be required to build its public acceptance as a quality gasoline retailer through company operated stations before either customers or dealers could be secured.

(b) *Standards of Quality and Service* – Company operated stations provide an opportunity for Shell to demonstrate and provide standards for overall service station merchandising,

appearance and levels of customer service. This encourages dealers and jobbers to strive to achieve the highest standards of service station operation.

(c) *Response to Market Conditions* – Shell, through its company operated stations, attempts to initiate positive, quick and effective response to changing market conditions. This action is realized not only through the development of new merchandising and financial control techniques and equipment development, but also through operating procedure designed to ensure consumer satisfaction. During the energy shortage, for example, company operated stations, when possible, attempted to lessen the obvious hardships through coordinating the operating hours of various stations in the same area. Although such advice was offered to dealers, they had the option, as independent businessmen, to sell their allotted supplies quickly and curtail operations, thereby reducing normal expenses.

(d) *Source for "Temporary" Personnel* – Company stations employees allow for the continuous operation of a dealer station when that dealer dies or otherwise unexpectedly leaves the station. Without such available personnel to assume "temporary" operation of a station, the consumer may lack the convenience of his customary service and the new dealer may lose the benefit of the clientele built up through the previous operation. Although Shell, at times, has requested local dealers to continue such operations on a temporary basis, obvious business considerations indicate such a procedure is less desirable.

(e) *Training Schools* – Company operated facilities are also utilized as training schools. They provide a first-hand basis for learning the business of petroleum retailing. This experience may qualify a graduate to operate his own service station at a future date, or proceed in a professional career with Shell. This has been particularly valuable for the unskilled workers.

(f) *Source of Potential Personnel* – Company operated stations also serve as a source for potential dealers. Those Shell dealers coming from the ranks of its company operated station employees are well trained in the fundamentals of the service station business. Furthermore, company stations provide a reservoir of personnel for promotions to supervisory and executive positions within the Shell Oil Company. In the past, some top marketing officials started their careers with Shell as service station operators.

18. Finally, it is necessary to refer to the language of Paragraphs B and C of the Maryland Act which, in my opinion, insofar as it speaks in terms of "producers" and "refiners" of petroleum products is vague and ambiguous. I am aware that the various questions relating to these terms has been presented to the Court in a Motion For Partial Summary Judgment, and a memorandum in support thereof and in a Pre-Trial Brief. Those pleadings are incorporated herein by reference.

Paragraph D of the Maryland Act – Uniform Price Assistance

19. Under specified market conditions, Shell grants temporary price reductions, or "competitive allowances", to its branded retail dealers. Shell's policy in granting competitive allowances is to provide competitive and equitable assistance in gasoline prices to Shell dealers who are injured by local competitive gasoline price reductions of competing retailers which are subsidized by their suppliers.

20. A competitive allowance is intended for use when Shell's branded dealers suffer financial injury, in terms of loss of customers, reduced unit profit, or both, because a supplier in competition with Shell lowers its price to its retail dealers. By meeting its competition through reduced product cost to its dealers, Shell believes it enables those dealers to remain competitive and thus retain the business of their customers.

21. The "trade area" is the basic geographic area for the authorization of competitive allowances.

22. A trade area is a designated geographic area in which an assessment by Shell field personnel and staff analysts indicates that competitive marketing conditions are substantially the same. It is Shell's opinion that all service stations within a trade area have exposure to substantially the same customers and therefore the ability to compete with one another on a relatively equal basis. There are one or more, usually several, Shell service stations in each trade area. The areas may be of various sizes with the smaller ones generally in the more densely populated metropolitan districts where the customer potential is concentrated; larger ones are more characteristic of less populous areas or corridors along heavily traveled arterials where commuter or transient travel is heavy over considerable distances.

23. Decisions with respect to Shell's geographic delineation of competitive trade areas are based on such factors as the following:

- service stations that are in the immediate vicinity of each other will be considered in competition with each other, and even a one-cent differential at retail may result in substantial decrease in gallonage;
- service stations that are near each other but are separated by road networks or other artificial or natural barriers would not be in competition if motorists would not go out of their way to circumvent those barriers to obtain a more favorable price;
- rural stations will be in competition at greater distances than urban stations; conversely, stations in congested urban areas may not be in competition when one-half mile apart, whereas stations in sparsely populated urban areas may be in competition when several miles apart;
- service stations may be in competition when located substantial distances from each other if they are located along a highway frequented by commuters;
- service stations may be in competition when located substantial distances from each other if they effectively solicit business from a residential or business population located in the area between them;
- service stations may be in competition when located a long distance from each other if one is in a residential area and the other in a business area and a large number of motorists commute by automobile between the two areas.

In a particular "price war" situation, other factors, such as the following, must be given consideration:

- The amount of the price difference—Service stations may not be in competition at a retail price difference of one-cent per gallon but may be in competition at a retail price difference of three cents per gallon. This, in my opinion, is because motorists who would not go out of their way for a one-cent price difference may be induced to do so by a three cents per gallon lower price. It may be said that the affected area becomes larger as prices become more depressed;
- The length of time of the price differences—The price difference, even in a large amount, may have little or no competitive effect if it is of short duration. However, even a small price difference may have substantial effect upon competition if it is of long duration. The same result may be found where there are repeated short periods of price differences over a long period of time.

24. Shell's policy is to grant competitive allowances only when certain marketing conditions exist. First, Shell grants a competitive allowance only if a Shell dealer requests it; Shell never initiates price assistance. Second, the Shell dealer requesting the allowance must be able to demonstrate real business losses from competitors selling at lower prices. Third, Shell, and not simply its dealers, must determine it is meeting competition; it is not sufficient that a Shell dealer is

competing with a lower retail price, but that lower price must be supported by that competing dealer's wholesale supplier.

25. If Shell grants a competitive allowance to a dealer, it is Shell's policy to offer an equal allowance to all Shell dealers in the same trade area. To the extent necessary to avoid competitive injury, allowances in appropriate competitive amounts are also given to Shell dealers in adjoining trade areas. The amount of such allowances decreases as the distance from the trade area increases. This concept is known as "feathering."

26. In referring to Shell's then existing plan for granting competitive allowances, which was essentially the same as explained in paragraphs nineteen (19) through twenty-five (25) above, the Federal Trade Commission stated:

> That the Commission's statement of Policy [regarding competitive allowances] can be realistically applied to area price differentials in the petroleum industry was impressively demonstrated in recent hearings before a subcommittee of the House Select Committee on Small Business. There representatives of Shell Oil Company . . . testified that, in view of the Robinson-Patman Act, such "price assistance" as they give dealers is now offered to all their dealers in a competitive retail marketing area. Their testimony as to this practice emphasized essentially that the same elements as the Commission's Statement of Policy.

27. When Shell grants a dealer an allowance it does not, directly or indirectly, secure the dealer's agreement that the allowance will be reflected in a lower retail price. Whether the dealer will account for his lower cost

resulting from the allowance by reducing his retail price is a decision solely within the dealer's discretion. This is recognized by each Shell branded dealer who participates in Shell's competitive assistance program through execution of the form attached hereto as Exhibit 3 and incorporated herein by reference.

28. Apart from any possible legal conflict which exists between federal requirements and the requirements of the Maryland Act, it is my opinion that the uniform allowance provision of the Maryland Act would be detrimental to both the consumer and the independent service station dealer and it would discriminate among suppliers of gasoline. In particular it is my opinion that the following would happen with respect to the indicated groups:

> *Consumer* – the uniformity provision would result in higher gasoline prices to the consumer. When confronted with the choice of reducing prices throughout the State to meet local price competition or not reacting to such competition at all, a supplier may find it economically prohibitive to act competitively. For example, Shell, on the average, supplies 411,000 gallons of automotive gasoline per day within the State of Maryland. If Shell were to grant a price allowance of 3 cents for every such gallon, the cost to Shell would be approximately $12,000 per day. Thus a supplier, under the conditions imposed by Paragraph D, may not meet the local price competition. This may have the effect of inducing a higher overall price level than would have prevailed without the Act or forcing a withdrawal from the affected area, the State of Maryland. Both actions would be damaging to the consumer, the former by encour-

aging higher market prices and the latter by raising prices indirectly through reduced competition.

Dealers – As stated, it is likely that a supplier would find it economically prohibitive to meet the equally low price of a competitor in light of the broad price reductions required by the Maryland Act. Thus, a dealer would be forced to absorb fully the cost of reducing his price in order to meet local price competition, thereby experiencing a reduction in margin. Thus, the dealer would face the prospect of a decline in margin or, if he chose not to reduce his price, a decline in volume, either of which would reduce his profit and, if severe enough, may cause termination of employees, reduced customer service and ultimately business failure. The problem would be most acute in traditionally unstable markets, low-cost markets and in markets close to the borders of the State. In the latter case, there could be constant pressure on prices from dealers beyond the State boundaries but nonetheless in the same trade areas as dealers within the State. Those dealers beyond the boundaries of the State of Maryland would use price to attract business from within the State. The geographic boundaries established by the Maryland Act would, in my opinion, result in artificial, anticompetitive market actions.

Suppliers – The Maryland Act also discriminates in favor of those petroleum suppliers who market in the smallest area of the State. Since the cost imposed upon them by the Act are obviously less in amount, such a supplier could direct the impact of his power to the competitive disadvantage of not only other suppliers but also of particular

dealers. Generally, the larger the supplier, the less likely he could afford to meet competition in limited markets. As a consequence of not meeting competitive prices, the supplier may be forced to withdraw from the affected markets if lower volumes do not generate sufficient profits to meet an acceptable return on investment.

29. In addition to any possible conflict between Paragraph D of the Maryland Act and the federal law and, in my opinion, apart from Paragraph D's detrimental effect on the consumer, independent dealers and suppliers, Paragraph D of the Act raises further areas of concern. Specifically the term "voluntary allowances" is undefined in the Maryland Act and, thus, it is not clear whether that term would, for example, encompass granting rent relief or extending a rental abatement to a dealer for such reasons as avoiding the economic impact of a temporary road closing or mitigating the hardship of a fire at the dealer's station. If such rent relief is considered a "voluntary allowance", Paragraph D would require the extension of the allowance State-wide. There would be no economic basis for the landlord to grant the relief in such a situation and, again, the cost, in all likelihood, would be economically prohibitive. Thus, the individual dealer deserving such relief would be forced to suffer a loss.

Paragraph E of the Maryland Act – Uniform Equipment Rentals

30. Shell, of course, is engaged in the retail marketing of gasoline and related products. Shell sells gasoline to retail dealers under dealer sales agreements, a sample of which is attached hereto as Exhibit 4 and incorporated herein by reference.

31. As another part of its business, Shell leases or subleases service station properties to dealers under dealer leases, a sample of which is attached hereto as Exhibit 5 and incorporated herein by reference. Shell leases or subleases to dealers approximately 10,000 service stations nationwide and 194 in the State of Maryland. Dealers who lease or sublease service station properties from Shell are not required by contract to purchase gasoline from Shell. Nationwide, Shell gasoline is sold at approximately 10,000 additional outlets which are neither owned by nor leased to or subleased by Shell.

32. When Shell leases a service station facility to a dealer, the Shell-owned equipment at the station is included in the lease arrangement.

33. The rental charged by Shell for service station properties is determined by their value as commercial real estate for their intended use. Rentals, although most times payable in cents per gallon, with a minimum and sometimes a maximum dollar rental per month, are nevertheless set on the basis of the value of each property as commercial real estate at the time, and at its location. The rentals charged by Shell and rental increases are wholly determined by factors unrelated to the price of gasoline. These factors include the following:

(a) Traffic factors, including the direction, speed and density of traffic, and its variation during various periods of the day;

(b) The costs of land, construction, financing, and maintenance in the indigenous area;

(c) In the case of stations not owned by Shell but leased by Shell from others, and subleased to

dealers, the rental which Shell must pay as a lessee of that real estate;

(d) The amount of and increases in real estate taxes and assessments;

(e) The general location of the station, *e.g.*, whether it is located in an industrial, commercial, residential or tourist area;

(f) The population of the surrounding area, including its size, density, growth-rate, median age and income level;

(g) The number of registered vehicles in the neighborhood, the number of vehicles per household and the number passing the specific property;

(h) Competitive factors, such as the location of competing stations in the vicinity;

(i) Local statutory and non-statutory restrictions on service station construction and operation, including zoning regulations, regulations effecting hours of operation, fire codes, building codes, restrictions on delivery tank truck size, restrictions on the size of storage tanks, proximity ordinances, and construction moratorium;

(j) The size and shape of the site, with particular emphasis on its usable frontage adjoining principal stores or highways;

(k) Projected and potential changes in traffic patterns, population and service station leases;

(l) The location of the station, with particular emphasis on whether it is located at an intersection or in the middle of the block and the effect of nearby traffic signals and other restrictions upon entry into and exit from the service station;

(m) The visibility of the station from different streets, roads, highways and lanes of traffic and the ease of approach to the station from such points of visibility.

34. Some but not all of Shell's dealer leases provide for rent to be collected on the basis of the volume of gasoline delivered to the service station. The collection of rent in terms of cents per gallon has been Shell's historical method of operation, simply because it facilitates rent collection at the time of delivery. In other dealer leases, the rental is expressed in a flat dollar monthly sum.

35. In light of the landlord-tenant facet of Shell's relationship with its directly served dealers which, in varying degrees, would be similar to that of other landlord-suppliers and landlord-wholesalers of petroleum products, the requirement of applying "all equipment rentals uniformly to all retail service station dealers supplied" is not only ambiguous and vague, but it is without rational foundation. In my opinion:

– The ambiguity and vagueness of the requirement is demonstrated, for example, by the following questions:

whether "equipment" is limited to mean hand tools or storage tanks or gasoline pumps or lifts or automated car washes or the entire service station facility; whether "uniformly" is to be measured in terms of cents per gallon or a strict monetary basis per item of equipment; whether "uniformly" is used in the context of the various stratas of retail operations, that is in relationship to the comparison between a sparcely patronized

single pump operation and a sophisticated, high volume operation.

– The lack of rational foundation is evident from the following:

If rental of the entire service station premises is not within the proscription, a supplier would calculate the rental for each service station as a whole, including within the cost the rental value of all affixed equipment, which constitutes the majority of service station "equipment," made available. If rental of the entire service station premises is within the proscription, a uniform price requirement has no rational basis. Whether based on a flat monthly amount or in terms of cents per gallon, the uniformity would not take account of the differing values of properties. Apart from the question of location, only a small portion of a Shell service station property is devoted to the sale of gasoline. The leased premises include many areas not devoted to gasoline sales, such as service bays for repairs and automobile maintenance, storage areas, parking areas, office space, car wash area and yard. These amenities, facilities or attractions, as well as those factors set forth above, have property oriented values which differ from location to location. In this respect, properties are not "similar" and a "uniform" rental could not be calculated. Correlatively, a flat uniform charge to all dealers would have an economically prohibitive effect on the less prosperous dealers.

Similarly, if Paragraph E requires that rental abatements for such reasons as previously discussed (*e.g.*, fire damage) be uniformly extended, it would impose an economically prohibitive burden that undermines all correlation between the rental value of property and the rental charge.

Paragraph F of the Maryland Act – Uniform Allocation

36. Shell was and had been since its inception operating in conformance with the federal mandatory allocation program as administered by the Federal Energy Administration. The rules and regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 did not speak of allocation in terms of "uniform" allotments. Indeed, a fair and equitable system of distribution could not be established on a basis of strict uniformity. In my opinion, the requirement of Paragraph F of the Maryland Act – to "apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis and [to] not discriminate among dealers in their allotments" – is in conflict with the nature of the federal requirements that had been set forth. The allocation requirements of the federal law were set forth in "Shell Oil Company's Motion For Partial Summary Judgment," filed May 27, 1975 and the "Reply" filed with respect thereto. Those pleadings are incorporated herein by reference.

37. Also, it must be recognized that Shell's policy has been one of fair and equitable distribution of petroleum products. Prior to implementation of the federal program in January 1974, Shell established a voluntary allocation system. Those documents attached hereto as Exhibit 6 and incorporated herein by

reference set forth the procedures adopted and, in my opinion, reflect Shell's policy, i.e., "developing a program which has full and primary emphasis on fairness and equity for all customers has been of prime concern. Our usual objective of maximizing profitability, in fact all concerns of commercial significance, must be secondary to concerns of fairness and equity in the implementation and administration of an allocation program."

38. The part of Shell's voluntary allocation procedures set forth below, which is essentially the same as the parallel federal laws that were developed, exemplifies the inconsistency between a strictly uniform allocation and an equitable distribution system:

RETAIL MARKETING

A. Base Volume

The retail district will establish for each direct service station, full line jobber, and other district accounts a Base Volume, by month, equivalent to the previous calendar year's sales for the respective month.

B. Adjusted Base Volume

Market and/or trade area occurrences which significantly influence the potential volume that would normally exist if an allocation situation was not in effect may constitute justification for *increasing or decreasing* the monthly Base Volume as established by the above method A.

DIRECT SERVICE STATIONS

The following are acceptable occurrences that may permit a change in the Base Volume:

1. NTI (New To Industry)/NTS (New To Shell) & Lost Accounts
2. Dealer changes (including dealers in training)
3. Road changes
4. Station modernization or rebuilt (including in-bay carwashes installed or legally committed for installation)

The above occurrences which significantly affect the volume must have occurred prior to May 1, 1973 in order to justify increases or decreases in the allocation. Furthermore, the occurrences must be documented on an individual account basis and be substantiated by the historic sales records.

NTI/NTS, Modernization and rebuilt units which we are contractually committed to but not on stream prior to May 1, 1973 must have a Base Volume which reflects the volume contained in the approved Real Estate Proposal. NTI/NTS units which have not been committed contractually at the time of the G.A.P. implementation, will not be brought onstream during the allocation period. (Committed contractually is defined as those purchase options and or leases which we are legally obliged to consummate).

39. It is my opinion that to the extent Paragraph F requires a strictly uniform allocation of petroleum products, such an allocation cannot be "on an equitable basis." If, on the other hand, the requirement of apportioning gasoline "on an equitable basis" imposes a duty to allocate on some basis other than absolute uniformity, it is lacking in an intelligible standard. Furthermore, Paragraph F fails to specify the manner in which and the basis upon which "periods of shortages"

will be determined. In my opinion, it is therefore unclear whether the Gasoline Tax Division of the State of Maryland is to designate such periods or whether it is necessary for the Governor of Maryland or the President of the United States or the Federal Congress or the State Legislature or some federal agency to issue such a decree; also, the basis or standard for utilizing the authority and issuing such a decree is undefined.

40. In sum, it is my opinion that the Maryland legislature must have acted without a basis of understanding the retail petroleum market and the needs and interactions of the elements composing that market place. Correlatively, as a result, it is my opinion that Chapter 854 of the Laws of Maryland, as it pertains to divorcement, uniform voluntary allowances, uniform equipment rentals, and uniform apportionment of supplies, is contrary to the welfare of the people of the State of Maryland.

41. I am competent to be a witness and I have personal knowledge of the facts hereinabove stated, including knowledge through certain business records, as hereinabove described.

/s/ Walter D. Naughton

Subscribed and sworn to before me
this 4th day of September, 1975.

/s/ Mildred A. Chadwick
NOTARY PUBLIC

MILDRED A. CHADWICK
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1977

The following exhibits of plaintiffs introduced at trial have not been printed, however, they are available in the lower court's record which has been transferred to this Court:

(a) Plaintiffs' Exhibit #1: (Exxon) Thirty (30) photographs of the various types of retail service station facilities operated in Maryland by Exxon Corporation or independent dealers under the Exxon brandname.

(b) Plaintiffs' Exhibit #2(a) and #2(b): (Continental-Kayo) Photographs of the typical type of retail service station facility operated by Kayo in Maryland.

(c) Plaintiffs' Exhibit #6: (Gulf) Photographs of a Gulf company operated facility known as a "Tire-Hut".

(d) Plaintiffs' Exhibit #7(a) through 7(g): (Petroleum Marketing Corporation) Photographs of typical retail service station facilities operated in the State of Maryland by Petroleum Marketing Corporation under the brandname "Scot".

(e) Plaintiffs' Exhibit #9: (Petroleum Marketing Corporation) A "Cost Factor Changes Chart", which is a plot of costs to Commonwealth Petroleum for such items as crude oil, refinery operating costs, freight costs, taxes, etc. for the years 1969-1975.

(f) Plaintiffs' Exhibit #10(b): (Shell) Six (6) exhibits attached to and submitted with Shell's Exhibit #10(c) Affidavit of Walter D. Naughton.

(g) Plaintiffs' Exhibit #12: (Ashland) Photographs of the various types of retail service station facilities operated by Ashland.

(h) Plaintiffs' Exhibit #13 (A & B): (Ashland) Copies of graphs indicating "crude oil costs"

(1973-1974) to Ashland and "refinery runs" (1974-1975) by Ashland.

DEFENDANTS' EXHIBIT A

STATE OF MARYLAND
EXECUTIVE DEPARTMENT
Annapolis, Maryland 21404

June 13, 1973

Honorable Louis L. Goldstein
Comptroller of the Treasury
State of Maryland
State Treasury Building
Annapolis, Maryland 21404

Dear Mr. Comptroller:

During the past several days, my office has received numerous complaints about the availability of quantities of gasoline during the current real or contrived shortage of fuel.

A number of callers have noted that certain filling stations associated with specific brands of gasoline are open 24 hours a day and have no limit on the amount of a purchase, while others have attempted to spread out their supplies by reducing the amount of gasoline that can be purchased as well as shortening the hours they are open.

I might add that there appears to be a pattern of frequency among the brands of gasoline mentioned that are available in unlimited quantities and on a 24-hour basis.

I would appreciate it very much if you would ask the Director of the Gasoline Tax Division of the Comptrol-

ler's Office to conduct a survey among filling stations to determine whether certain brands are more plentiful than others.

Specifically, I would like to know whether company owned and operated filling stations are being given larger quotas of gasoline than privately operated and independent filling stations. Also, I would like to know the number of hours company owned and operated filling stations are open for business as opposed to privately operated and independent filling stations, and the average amounts of gasoline each of these is making available to motorists on an individual basis.

I believe the citizens of Maryland are entitled to have this information so they will be able to judge for themselves the gravity of the energy shortage and the motives or reasons for its causes.

Therefore, I would appreciate the results of this survey as soon as it is completed to your satisfaction.

Sincerely,

/s/ Marvin Mandel
Governor

DEFENDANTS' EXHIBIT B

COMPTROLLER OF THE TREASURY
GASOLINE TAX DIVISION
P.O. BOX 1751
STATE TREASURY BUILDING
ANNAPOLIS, MARYLAND 21404
TELEPHONE (301) 267-5131

June 29, 1973

TO ALL RETAIL SERVICE STATION OPERATORS

The Honorable Marvin Mandel, Governor of Maryland, has requested our office to investigate the availability of gasoline in the State of Maryland.

The enclosed Questionnaire is designed to determine whether company owned and operated service stations are being given larger quotas of gasoline than privately operated and independent stations.

From the information you provide, we will also be able to determine why some service stations operate 24 hours a day when others are open for a shorter period of time.

In order to evaluate the overall impact of the shortage of gasoline on both the retail service station dealer and the ultimate consumer, we are requesting your cooperation in completing the questionnaire and returning it to our office by July 20, 1973. The

information you submit on your questionnaire will be kept confidential. Thank you for your cooperation.

With kindest regards, I am,

Cordially yours,

/s/ Louis L. Goldstein
Louis L. Goldstein,
Comptroller

LLG:bdz
Encs.

ANNAPOLIS, MARYLAND 21404

1. During period January 1, 1973 thru June 13, 1973 did you operate a retail service station? _____ yes or _____ no

   If Yes, complete the following where applicable to your operation:

   ____ Major oil company owned and operated (salary or commission agent).
   ____ Major oil company owned and leased to you.
   ____ Privately owned and leased to you by oil company or branded distributor.
   ____ Privately owned by you and operated by you.
   ____ Retail station operated under major oil company brand (accepts company credit cards).
   ____ Retail station operated under independent or private brand.

   Leased from: _____

   _____

   _____

   Brand: _____

2. Allocation:

   Has your allocation been changed during period January 1, 1973 thru June 13, 1973? _____yes or _____no

   If Yes, _____ upward or _____downward.

3. If supply was reduced, explain the formula given you for your allowance:

   _____

   _____

   _____

4. If allocation was not applied equally to each grade of gasoline, explain specific allocation to each grade. _____

   _____

   _____

5. When were you notified, by whom, and how? _____

   _____

6. Based upon your normal hours of operation as of January 1, 1973, how many hours has your station been closed due to lack of product and/or product allocation, during the period January 1, 1973 thru June 13, 1973? _____

7. List dates and amounts of any voluntary allowances or any other subsidies or financial assistance withdrawn from you. _____

   _____

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8. List name and title of person or persons that recommended any change in hours and/or days of operation _____

_____

9. What was their recommendation? _____

_____

10. Sales to your customers:

Do you limit the number of gallons purchased by a customer? ____ yes or ____ no

If Yes, complete the following:

A. Who recommended or established amount to be sold each customer?

_____

B. How many gallons per customer per purchase? _____

C. Is same amount sold to all customers? ____yes or ____no

D. If same amount not sold to all customers, explain: _____

_____

_____

11. Complete attached " Schedule A ".

RETURN BY JULY 20, 1973 TO: Comptroller of the Treasury
Gasoline Tax Division
Post Office Box 1751
Annapolis, Maryland 21404

For Assistance call Annapolis - 267-5126.

SCHEDULE A

Comptroller of the Treasury
Gasoline Tax Division
Annapolis, Maryland 21404

Increase January 1, 1973 thru June 13, 1973

	Your Cost Per Gallon*				Your Posted Price				Hours of Operation			
	Prem.	Mid-Prem.	Reg.	Econ.	Prem.	Mid-Prem.	Reg.	Econ.	Wk. Days	Sun.	Holidays	Total Gallons Sold
Jan. 1, '72												
Jan. 1, '73												
June 13, '73												

	Cost Increase Per Gallon				Increase In Posted Price				Total Gallons	
Date	Prem.	Mid-Prem.	Reg.	Econ.	Prem.	Mid-Prem.	Reg.	Econ.	Allocated	Sold
Jan. '73										
Feb. '73										
March '73										
April '73										
May '73										
June '73										

*Include Product Price and all taxes only. (Do not include rent, overrides, payoacks, etc.)

List reason your supplier gave you in reducing the amount of product supplied to you and any comment or additional information you desire to submit or make available for examination by an agent of the Comptroller's Office.

_____

_____

_____

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DEFENDANTS' EXHIBIT C

CONTROLLER OF THE TREASURY
GASOLINE TAX DIVISION
P.O. Box 1751
ANNAPOLIS, MARYLAND 21404

QUESTIONNAIRE

ALL INFORMATION REQUESTED IS TO BE REFLECTIVE OF MARYLAND ACTIVITY ONLY

1. Retail Service Station Information:

	Calendar 1971	Calendar 1972	Jan. 1, 1973 to June 13, 1973	
Number of New Stations Opened				XXXXXXXX
Number of Stations Rehabilitated by Major Renovation				XXXXXXXX
Number of New Stations Currently Under Construction	XXXXXXXX	XXXXXXXXX	XXXXXXXXXXXXXX	
Number of Stations acquired from other companies, jobbers, and individuals				XXXXXXXXX

2. Number of New stations planned for Construction during 1974_____1975_____.

3. Total Volume reflected for New Station Construction during 1974_____ 1975_____.

4. Volumes:
Please indicate the projected annual volumes contained in your Real Estate Proposals and/or earnings estimates to your General Management for all stations (as a group) by category and schedule below:

	Calendar 1971	Calendar 1972	Jan. 1, 1973 June 13, 1973	June 13, 1973 Dec. 31, 1973
New Stations Opened				XXXXXXXXXXXXXX
Existing Stations Rehabilitated by Major Renovation				XXXXXXXXXXXXXX
New Stations Planned to Open	XXXXXXXX	XXXXXXXX	XXXXXXXXXXXX	

*Indicate Real Estate or Earnings Estimate Total volumes for Stations Anticipated ready for Operation.

5. Total Number of Unbranded accounts to whom gasoline sales were made in 1972 _____. What was total volume sold to these accounts_____.

CONTROLLER OF THE TREASURY
GASOLINE TAX DIVISION
P.O. Box 1751
ANNAPOLIS, MARYLAND 21404

QUESTIONNAIRE

6. Total Number of Unbranded accounts to whom gasoline sales were made during the months of June 1973_____. What was total volume sold to these accounts?_____.

7. How many Retail Service Stations do you operate at retail, either by Salaried personnel or Commission Management Plan (total combined) as of June 13, 1973?
_____.

8. How many of above operations did you have as of midnight December 31, 1971?
_____. Midnight December 31, 1972_____.

A. Are these allocated differently from Lessee Dealers? yes_____no_____

10. How many of your branded service stations are on Full Self-Service?_____.
Partial Self-Service?_____.

11. Number of Retail Service Stations Closed and Deactivated during periods indicated:

A. January 1, 1972 thru June 30, 1972_____.
B. July 1, 1972 thru December 31, 1972_____.
C. January 1, 1973 thru June 30, 1973_____.

12. Commercial-Consumer Volume (total gallons) sold in Maryland:

	Diesel Fuel	Gasoline
A. 1971	_____	_____
B. 1972	_____	_____
C. First six (6) months, 1973	_____	_____

13. Number of contracts cancelled and/or not renewed (combined total by category) during period January 1, 1973 thru June 30, 1973:

A. Lessee Dealer_____.
B. Commercial Consumer_____.
C. Jobbers (Sell gasoline & Fuel Oil)_____.
D. Heating Oil Distributors_____.
E. Municipal or other bids not renewed_____.
F. Marinas_____.
G. Independent (unbranded and/or branded that owned or controlled their individual location)_____.

GASOLINE TAX DIVISION
P.O. Box 1751
ANNAPOLIS, MARYLAND 21404

QUESTIONNAIRE

14. Indicate schedule of allocation by month and category of account:

	Lessee Dealer	Commercial Consumer	Salary/Company Operated Ser. St.	Marinas	Jobber	Heating Oil Dis.
January 1973						
February 1973						
March 1973						
April 1973						
May 1973						
June 1973						

15. Please list Dates and Increases (per gallon) in price to your classes of trade effective between January 1, 1973 and June 30, 1973 for Gasoline, Diesel Fuel, and #2 Heating Oil:

Date of Increase	Amount per gal.	Class of Customer affected	Type of Fuel

16. During the period January 1, 1973 and June 30, 1973, have you eliminated or reduced any of the following (yes or no):

A._____Rental abatements, if so, how many?_____.

B._____Voluntary Allowances, if so, how many customers affected?_____.

C._____Subsidies such as trading stamps, if so, how many customers affected?_____.

D._____Other financial assistance (light bill, etc.), if so, how many customers affected?_____.

COMPTROLLER OF THE TREASURY
GASOLINE TAX DIVISION
P.O. Box 1751
ANNAPOLIS, MARYLAND 21404

QUESTIONNAIRE

17. Have any of your representatives recommended any change in Service Station hours of operation?_____

_____

_____.

18. Have any of your Company Salary-operated Retail Stations, operating 24 hours per day, been reduced?_____ If yes, how many?_____.

19. How many new gallons of gasoline sales have been acquired during the period of June 30, 1972 thru June 30, 1973 through the acquistion of business on toll roads, such as New Jersey Turnpike, Garden State Parkway, etc. in the combined states of Maine, Vermont, New Hampshire, New York, Pennsylvania, Maryland, and Virginia?_____. (This should be an annual or total contract committment).

Prepared by:_____

Title:_____

MUST BE RETURNED BY JULY 31, 1973

DEFENDANTS' EXHIBIT D

RESULTS AND ANALYSIS OF SERVICE STATION DEALERS QUESTIONNAIRE

Questionnaire's seeking information for the period January 1, 1973, through June 13, 1973, were sent to 4055 Service Station Dealers. Only 1407 (34.7%) expressed enough interest to even reply. Returns were received as follows:

MAJOR OIL COMPANY OWNED, LEASED TO DEALER	772
PRIVATELY OWNED, OPERATED UNDER A MAJOR BRAND	503
UNBRANDED	80
COMPANY OPERATED	52
TOTAL	1407

MAJOR OIL COMPANY OWNED, LEASED TO DEALER: Returns were received from 772 leased outlets that were allocated in the range of 70% to 106% of their prior years purchases. There were 171 outlets unrestricted insofar as allocation was concerned. A total of 93,287 hours were lost by this category with only 158 limiting sales to their customers. Wholesale price increases ranging from .9 to 5.5 cents per gallon were experienced by 188 outlets with 412 outlets increasing their pump posted prices from .8 to 6.6 cents per gallon. Temporary voluntary allowances withdrawn during this period range from .5 to 7 cents per gallon. Voluntary allowances (discounts) are extended to a

dealer in order to enable him to be more competitive in a trade area and thereby increase his volume. Prior to the "shortage" dealers were compelled by lease to maintain predetermined longer hours which include Sundays. This is a normal action designed to continue the ability of an outlet to sell more gasoline. Just prior to the alleged "shortage" many dealers were encouraged to stimulate volume through the use of glassware promotions, national football league books, and other items. Also, during the first half of this year we saw the innovation of self service, the far lower posted pump prices, by many major oil company dealer-leased outlets. This was another means to increase gasoline sales. Several dealers were forced to move from their existing locations to inferior locations, in order for the companies to rehabilitate with a larger operation and in some cases company operate the outlet. This, naturally, increases the demand for product through a rebuilt or renovated outlet. It is interesting to note that we have a written statement from one dealer in Eldersburg, Maryland, who was told by a company representative, to expect a survey form through the mail but when it comes, do not open it. The BP Company applied the smallest allocations to their dealers.

PRIVATELY OWNED, OPERATED UNDER A MAJOR BRAND: This category was the most abused and was allocated from .0% to 150% of the prior years purchases. Of the 503 reporting, 378 were forced to close or to limit sales to their customers and also experienced the withdrawal of voluntary allowances ranging from 1 cent to 1½ cents per gallon. In this category 162 experienced a wholesale price increase from .5 cents to 8.0 cents per gallon and 211 of these

outlets increased their pump posted prices from .5 to 10.0 cents per gallon. There was a high degree of activity between major oil companies in the cancellation of leases with this type operator and it is assumed that because of lease and lease back arrangements and other pricing arrangements favorable to the operator, this was done in order to channel that volume through their own controlled outlets wherein a greater profit per gallon could be achieved. In one instance, maintenance of the entire property was provided by the major oil company and this was completely eliminated in this category. BP continued to stand out in the poor treatment of this type of account. Newspapers carried several articles a few months ago in reference to the Butts BP Service Station, 8832 Belair Road, Perry Hall, Maryland. This individual had done business with his supplier (BP and their predecessors) for over 40 years and was selling 200,000 gallons a month at a discount price. In June he was allocated 168,000 gallons and BP did not renew the lease upon its expiration on June 30, 1973, pulling all pumps and equipment and refusing him any gasoline whatsoever. Greenbelt Consumer Service, Incorporated, operates 10 branded BP outlets in the suburban D.C. area. They were advised their contract was cancelled three months before its expiration date and after discussions by the supplier and Greenbelts attorney's it was decided they must live up to their obligation and supply the account for the balance of the contract period. Greenbelt Consumer Service, Incorporated, had been a branded BP chain for several years and according to its manager accounted for 20% of the BP volume in their geographic area. Here again, we can only assume action of this type is to

eliminate the "deep discount" business and rechannel it through controlled higher profit outlets. In another instance, Mr. Edward E. Green of Kingsville, Maryland, was notified that BP would no longer supply him any gasoline after September 19, 1973. This gentleman had been operating for over 60 years. BP arranged to loan Clinton Car Wash $146,000 for the construction of a Car Wash Gasoline facility in return for a 10 year lease back arrangement during 1970. The payback arrangement amounted to $1849.00 per month and was based on a volume basis. Upon being allocated only 70%, Clinton sought relief from the high payback and attempted to adjust it at least to coincide with their allocation. Clinton was told by a Mr. Taggert in a very candid way that the general concept of the BP-Sohio was to maintain only company owned stations. These are but a few specific instances which clearly indicate the trend by some major oil companies to eliminate this category of account in a premeditated manner.

UNBRANDED: Unbranded locations are also privately owned and are similar to the aforementioned category except that they post no brand identification. Of the 80 outlets reporting, only 13 were unrestricted in their allocation of product while 67 were allocated from 49% to 90% based on their purchases for the same month of the prior year. This small group of 80 outlets lost 23,942 hours of station operation with 70 of them limiting sales to their customers. Due to very small amounts allocated or being cut off completely, 39 were forced to close. Of this category 58 experienced a wholesale price increase ranging from .5 to 9.75 cents per gallon and 61 increased their pump posted prices from .5 to 10.0 cents per gallon and due to the withdrawal

of voluntary allowances, hauling allowances and the privilege extended to many by several suppliers of buying at jobber prices. These outlets were forced to raise their prices to a point where they could no longer compete with branded outlets of better facilities in their trading area. Due to the lack of appropriate Federal law, price for foreign product could go up under the existing Federal guidelines and there was no protection for this type of account.

COMPANY OPERATED: The 52 reporting outlets indicated they were either unrestricted in their purchases or allocated 100% of their needs. Only one indicated he was allocated at all. In this category 51 reported pump posted price increases ranging from 1.0 cents to 6.0 cents per gallon. No replies were received from Crown Central Petroleum Company but by observation and investigation we determined they were able to remain open 24 hours a day. During one week only, and at only one observed location, was there any effort by Crown to limit their sales and this occurred during the hours of 10:00 p.m. to 4:00 a.m. wherein they limited to a $2.00 purchase but we observed consumers being permitted to make two $2.00 purchases. Exxon owns and operates a secondary brand of outlets "Alert" and they failed to provide any detailed information for these outlets to this office. The source of supply for the "Alert" outlets is Crown Central Petroleum Company. We have no information as to hours of operation, volumes or allocations in reference to the "Alert" outlets, but rather our observations concluded the "Alert" stations continued normal hours of operation and appeared to be under no allocation program whatsoever.

Based upon the total returns received in this office, it is quite evident that company operated outlets were virtually unaffected insofar as gasoline availability was concerned.

The independent, both branded and unbranded certainly experienced the greatest difficulty in obtaining gasoline in view of the fact a total of 48 outlets were forced to close. These two categories certainly experienced the greatest cost per gallon increase.

In the major oil company owned but leased to dealer category the product availability did not significantly reduce, it did appear, however, to be redirected to different outlets. Dealers appeared to seize upon the opportunity to reduce station hours by eliminating Sundays, closing early, etc., while still selling basically the same volume of gasoline as in the previous months of the prior year.

Analysis of the returns received clearly indicated a trend to restrict, and in many cases, eliminate through contract cancellation, outlets with lower than average volumes and individuals who owned their own locations and were on a lease and lease back arrangement. These latter people usually enjoy a better arrangement than a normal dealer, for in some instances an individual will lease a location he owns to the oil company, for say $500 per month, then leases it back for $1.00 per month. In this manner, price discrimination is eliminated, the owner paid for his investment, but the oil company enjoys a lower profit per gallon, hence, redirect this volume through an owned facility and the result is, greater profit on that gallon plus a rent charge on the gallon, for the oil company.

The fact that 65.3% failed to bother to return our questionnaire further supports the above statements. It indicates either no problems at all, they like the reduced hours of operation, were just totally unaffected, or were fearful of responding for fear of reprisal by the major oil companies, or were instructed not to return the questionnnaire.

DEFENDANTS' EXHIBIT E

ANALYSIS OF MAJOR OIL COMPANIES QUESTIONNAIRES

On July 17, 1973, twenty (20) major oil companies were mailed questionnaires designed to compile the necessary data to further evaluate the request of the Honorable Marvin Mandel, Governor of Maryland, in regards to the gasoline shortage.

As of September 21, 1973, nine (9) major oil companies filed the questionnaires completely executed. Two (2) additional major oil companies filed, but refused to answer several of the questions which they considered to be proprietary and confidential. The majority of the nine (9) remaining companies indicated that they would refuse to complete and return the questionnaires.

In the calendar year 1971, nine (9) major oil companies constructed and opened forty (40) new stations. The same companies reported acquiring sixteen (16) additional stations from other companies or individuals, making a total of fifty-six (56) new service stations which required an additional 27,337,956 gallons.

In the calendar year 1972, these companies reported that they had constructed and opened thirty-seven (37) new service stations and that they had acquired, rehabilitated and opened sixteen (16) service stations that were obtained from other oil companies or individuals. The fuel commitment for these fifty-three (53) service stations amounted to 25,576,660 additional gallons.

During the first six (6) months of 1973, ten (10) new service stations were constructed and opened. Four (4) service stations were acquired from another oil company or individual, making a total of fourteen (14) stations which required 9,382,000 gallons of additional gasoline to operate.

For the 2½ year period, nine (9) major oil companies opened for business, one hundred twenty-three (123) new service stations with a gasoline requirement of approximately 62,000,000 gallons.

The survey, also, revealed that for the 2½ year period eight (8) companies rehabilitated ninety-four (94) existing service stations which undoubtedly increased the volume requirements for the same period.

During the period of June 30, 1972 thru June 30, 1973, three (3) major oil companies were successful in being awarded new contracts to supply service stations on toll roads in Maine, Vermont, New Hampshire, New York, New Jersey, Pennsylvania, Maryland and Virginia, totaling 66,780,000 gallons.

There were ninety-five (95) service stations closed or deactivated during the 2½ year period covered by the survey of which thirty-nine (39) were closed during the period of January 1, 1973 thru June 30, 1973.

During the period of January, 1973 thru June, 1973, five (5) major oil companies reported cancelling contracts to supply one (1) retail jobber, one hundred five (105) consumer accounts and sixteen (16) retail service station dealers.

During the period of January, 1973 thru June, 1973, seven (7) of the eleven (11) companies reported that they had withdrawn various types of voluntary

allowances from four hundred twenty-two (422) service stations.

Several of the major oil companies that submitted the completed reports requested that their specific data be treated as confidential marketing and trade secrets. Therefore, we are refraining from naming the companies that complied with our requests as well as those refusing to complete the questionnaires.

RETAIL SERVICE STATION ACQUISITIONS AND DEACTIVATED BY ELEVEN MAJOR OIL COMPANIES DURING THE CALENDAR YEAR 1971, 1972 AND FIRST HALF OF 1973

	NEW STATIONS	OLD STATIONS ACQUIRED FROM OTHERS	REHABILITATED	DEACTIVATED	UNDER CONSTRUCTION
Calendar Year 1971	40	16	41	22	x
Calendar Year 1972	37	16	38	34	x
First 6 months 1973	10	4	15	39	8
Total	87	36	94	95	8

ANALYSIS OF COMPARATIVE REPORT OF TAXABLE AND EXEMPT GASOLINE SALES FOR THE CALENDAR YEAR 1971, 1972, AND THE FIRST SIX MONTHS OF 1973

During the first six months of the calendar year 1973 a great deal of publicity was presented about the shortage of gasoline in the State of Maryland. We have therefore compiled a comparative report to determine the market position of each major oil company of the years 1971, 1972, and the first six months of 1973. The report reflects the percentage of growth and taxable sales for each company for the year 1972 as compared to 1971, and for the first six months of 1973 as compared to the first six months of 1972. Many reputable sources predicted that the percent of increase in taxable gasoline sales would be approximately 6% for the fiscal year June, 1973, as compared to fiscal year 1972. (See exhibit – U.S. Bureau of Mines Report).

In using a 6% increase factor for analysis in evaluating this report, we draw the following conclusions:

The Exxon Corporation sales for the first six (6) months of 1973 were 6% greater than those of the first six (6) months of 1972. The Exxon Corporation in 1971 held 18% of the Maryland market and for the first six months of 1973 maintained 18% of the market. The Exxon Corporation also allocated 100% of last year's supply to all retail service stations it supplies and increased this percentage in the month of June.

Amerada Hess Corporation taxable sales in Maryland in 1972 were 10% greater than their 1971 sales. The sales for the first six months of 1973 were 5% less than the first six months of 1972. The Amerada Hess

Corporation's share of the Maryland market was 3% for the calendar year 1972 as compared to 3% of the market for the first six months of 1973. This company operated company owned service stations in Maryland similar to those operated by the Crown Central Petroleum Corporation. A review of the Crown Central Petroleum Corporation activity in this report possibly could shed light on the decline of sales activity of Amerada Hess Corporation.

Amoco Oil Company taxable sales in Maryland in 1972 were 4% greater than those of 1971. The first six months sales for 1973 were 4% greater than the first six months sales of 1972. The Amoco Oil Company share of the market was 10% for the calendar year 1971, 1972, and the first six months of 1973. The percentage of increase in sales and share of the market indicated, on the surface, a modest but steady growth by this company. There is a strong possibility that the growth factor experienced by Crown Central Petroleum also had some effect on this company.

Ashland Oil Company Incorporated taxable sales in Maryland in 1972 were 19% greater than 1971 sales. The first six months sales for 1973 were 23% less than the first six months sales of 1972. Ashland Oil Incorporated is an independent refiner and does not operate any retail service station outlets in the State of Maryland. All of their other sales are to independent retail service stations and bulk customer deliveries. There is every reason to believe that Ashland Oil Incorporated did experience a shortage of crude oil and refined gasoline. They are in the process of negotiating with Iran to the extent of offering the Government of Iran 50% ownership of the Buffalo Refinery and a small chain of retail service stations for additional supplies of crude oil.

Atlantic Richfield taxable sales in Maryland in 1972 were down 25% from 1971 sales, and the first six months sales for 1973 were 11% greater than the first six months sales of 1972. The Atlantic Richfield Company share of the Maryland market was 3% for 1971, 1972, and the first six months of 1973. The Atlantic Richfield Company did experience an extensive employee strike in the calendar year 1972 which contributed to the decline of sales as compared to 1971. The 11% increase for first six months was far better than the predicted national average.

BP Oil Corporation taxable sales in Maryland in 1972 were 2% greater than 1971 sales. The first six months sales for 1973 were 6% greater than the first six months of 1972. The BP Oil Corporation share of the Maryland market was 7% in 1971, 1972, and the first six months of 1973. During the first six months of 1973, the retail service station operators branded as BP stations in Maryland experienced considerable difficulty in obtaining gasoline and those individuals owning the retail service station property, were in some cases, completely cut-off from supply, and contracts were cancelled. This oil company compiled the worst record of any oil company in the State of Maryland for maintaining its responsibility to the independent businessmen marketing their brand. During the six month period, they managed to meet the predicted percentage of increase which was the same percentage of increase that the Exxon Corporation maintained.

Chevron Oil Company taxable sales in Maryland in 1972 were 28% greater than 1971 sales. The first six months sales in 1973 were 133% greater than the first six months of 1972. The Chevron Oil Company share of the Maryland market was less than 1% of the sales of calendar year 1971, 1972, and 1973.

Cities Service Oil Company taxable sales in Maryland in 1972 were down 3% from 1971 sales. The first six months sales for 1973 were 6% less than the first six months sales of 1972. Cities Service Oil Company's share of the Maryland market was 4% of the calendar year 1971, 1972, and 3% of the first six months of 1973. During the last quarter of 1972, the Cities Service Oil Company changed its marketing policy in that by discontinuing sales to consumer accounts other than the retail service stations. This undoubtedly accounts for the decline in sales.

Continental Oil Company taxable sales in Maryland in 1972 were down 35% from 1971 sales. The first six months sales for 1973 were 25% greater than the first six months sales of 1972. The Continental Oil Company share of the Maryland market for the calendar year 1971 was 2% and 1% for the calendar year 1972 and the first six months of 1973. In 1971, the Continental Oil Company had been supplying the Petroleum Marketing Corporation gasoline for the Scott brand retail service stations and petroleum marketing bulk customers. At present, the Petroleum Marketing Corporation is being supplied by Commonwealth Oil and importing gasoline from Puerto Rico.

Crown Central Petroleum Corporation taxable sales in Maryland in 1972 were 32% greater than 1971 sales. The first six months sales for 1973 were 30% greater than the first six months sales of 1972. The Crown Central Petroleum Corporation share of the Maryland market was 3% of the calendar year 1971 and 4% of the calendar year 1972 and of the first six months of 1973. In 1972 The Crown Central Petroleum Corporation changed its marketing program by discontinuing service stations with repair bays, and starting a program

of high volume sales throughout the State thru "pumper" type stations. The Crown Central Petroleum Corporation owns and operates one refinery which operated 65% of capacity during the alleged "shortage", as a result of a lack of crude. With their exchange agreements with Coastal States Refining Company, they were able to maintain an adequate supply to all their locations in Maryland which enables these retail service stations to remain open 24 hours a day, 7 days a week.

Getty Oil Company Inc. taxable sales in Maryland in 1972 were 11% greater than 1971 sales. The first six months sales for 1973 were 3% greater than the first six months sales of 1972. Getty Oil Company Inc. share of the market was 1% for the calendar year of 1971 and 1972, and fell slightly below 1% for the first six months of 1973. The Getty Oil Company retails primarily to bulk customers for very limited retail outlet sales.

Gulf Oil Corporation taxable sales in Maryland in 1972 were 15% greater than 1971 sales. The first six months sales for 1973 were 11% greater than for the first six months of 1972. The Gulf Oil Corporation held 7% of the market in 1971, and in 1972 and the first six months of 1973 held 8%.

Mobil Oil Corporation taxable sales in Maryland in 1972 were 8% greater than 1971 sales. The first six months sales for 1973 were 7% greater than the first six months sales of 1972. Mobil Oil Corporation maintained 3% of the Maryland market of the calendar years of 1971, 1972, and the first six months of 1973.

Petroleum Marketing Corporation taxable sales in Maryland in 1972 were 84% greater than 1971 sales. This sizable increase was due to the fact that in prior

years, Petroleum Marketing obtained its gasoline from the Continental Oil Company which collected the taxes due. In 1972, The Petroleum Marketing Corporation began obtaining its gasoline from the Commonwealth Oil Company located in Puerto Rico. The first six months sales for 1973 were 8% greater than the first six months sales of 1972. The Petroleum Marketing Corporation share of the market in 1971 was 2%. It increased to 3% in 1972 and held the 3% for the first six months of 1973. Petroleum Marketing Corporation owns and operates the Scott brand retail service stations in the State of Maryland. They also supply numerous individual retail service stations in Maryland.

Phillips Petroleum Company taxable sales in Maryland in 1972 were 16% greater than in 1971. The first six months sales for 1973 were 16% less than the first six months sales of 1972. The Phillips Petroleum Company share of the market remained at 1% for the calendar years of 1971, 1972, and for the first six months of 1973. The Phillips Petroleum Company announced a general withdrawal program from the Northeastern market approximately two years ago, and have successfully withdrawn from all states north of Pennsylvania.

Shell Oil Company taxable sales in Maryland in 1972 were 4% greater than in 1971. The first six months sales for 1973 were 13% greater than in the first six months of 1972. In 1971 the Shell Oil Company had 9% of the Maryland market. In the calendar year 1972, they dropped to 8% of the market, and in the first six months of 1973 had 9% of the Maryland market.

Southern States Cooperative Inc. taxable sales in Maryland in 1972 were 7% greater than in 1971. The first six months sales for 1973 were 13% greater than in

the first six months of 1972. Southern States Cooperative Inc. has consistently held 1% of the Maryland market for the calendar years 1971, 1972, and the first six months of 1973.

Sun Oil Company of Pennsylvania taxable sales in Maryland in 1972 were 4% greater than in 1971. The first six months sales for 1973 were one-fourth of one percent greater than those of 1972. The Sun Oil Company of Pennsylvania has consistently held 4% of the Maryland market for the calendar years 1971, 1972, and for the first six months of 1973.

Tenneco Oil Company taxable sales in Maryland in 1972 were down 6% as compared to 1971. The first six months sales of 1973 were 17% less than the first six months sales of 1972. Tenneco Oil Company has consistently held 1% of the Maryland market of the calendar years 1971, 1972, and the first six months of 1973. Some of Tenneco's decline can be attributed to the Cities Service Oil company program of discontinuing to supply all commercial accounts except retail service stations. The Cities Service Oil Company and the Tenneco Oil Company maintain a terminal agreement and exchange agreements for marketing petroleum products in Maryland.

Texaco Incorporated taxable sales in Maryland in 1972 were 9% greater than 1971 sales. The first six months sales for 1973 were 5% greater than for the first six months of 1972. Texaco has consistently held 6% of the Maryland market for the calendar years 1971, 1972, and the first six months of 1973.

Union Oil of California taxable sales in Maryland in 1972 were down 24% from 1971 sales. The first six months sales for 1973 were 9% greater than the first six

months sales of 1972. The Union Oil Company of California has consistently held less than 1% of the Maryland market of the calendar years 1971, 1972, and for the first six months of 1973.

Out of the twelve unbranded independent dealers that controlled 2% of the Maryland market, the Royal Oil Corporation had a 55 percent increase for the first six months of 1973 over the same period in 1972. This increase was due to Cities Service Oil Company cancellation of bulk consumer accounts that were assigned to Royal Oil Corporation. The Royal Oil Corporation gasoline supplies came from Continental Oil Company, Coastal States Oil Company, and Cities Service Oil Company.

Eight other unbranded independent dealers' sales increased by 5% or more during the first six months of 1973. Three unbranded dealers' sales declined from 7% to 22% during the first six months of 1973.

In summary for the calendar year 1972, 14 major oil companies accounted for 85% of the total taxable gasoline sales in Maryland. For the first six months of 1973, the same 14 companies accounted for 84% of the total taxable sales in Maryland.

Eight companies indicated increases of 6% or more, ranging from 6% to 30%. Three companies reflecting a less than 6% increase did show increases ranging from one quarter of one percent to 5%. The three companies indicating losses were Amerada Hess with a 5% loss, Ashland Oil Company with a 25% loss and Cities Service with a 6% loss: however, Ashland operates no retail outlets in the State of Maryland, but rather sells to independent retail service stations and bulk customers. The Cities Service performance can be reflected in

the fact they completely eliminated all commercial consumer business during the last quarter of 1972.

With the high degree of Crown Central Petroleum (30% increase) activity in the field of "volume" outlets, there were many locations rehabilitated or constructed in the immediate proximity of Hess outlets and did tend to explain the small loss experienced by Amerada Hess.

Considering the number of new outlets constructed and those that were completely rehabilitated over the past 2 to 3 years, it would appear that any "shortage" would have to be pinpointed to specific locations rather than to a branded company as a whole.

Evidence reflected by the questionnaire returned by service station dealers clearly indicated inequities insofar as an allocation program was concerned. In essence, gasoline was diverted from the older poor producing outlets and channeled into the "new investment" outlets. Land and buildings for the normal three bay service station cost approximately $250,000. The normal yardstick in the industry is three gallons per $1.00 of investment. Thus, any new or completely renovated outlet places a tremendous drain on existing supply.

A cursory examination of the construction records made available to us for Montgomery, Baltimore and Anne Arundel counties indicated 49 new or major renovations took place in those three counties alone. Using the rule of thumb of 3 gallons per $1.00 of investment and the average cost of $250,000 per outlet we can see that an additional gasoline commitment was placed upon the system amounting to 36,650,000 gallons, by the companies involved.

Members of the industry have stood before Federal and State officials and stated they had predicted this shortage for over five years, yet we see continued construction activity increasing the demand for gasoline within our state.

Exxon Oil Company, Incorporated, operating service stations within our state, recently acquired all service stations on the New Jersey turnpike, (*new business*) amounting to approximately 50,000,000 gallons annually and maintained a 6% increase in sales in Maryland during the period of shortage. They also announced increases in allocation in June and July.

Approximately 100 field investigations were made as a direct result of statements or invitations on the Service Station Dealer questionnaire. It was clearly evident that many individuals that owned or operated their own facilities were having their contracts cancelled or permitted to expire without any apparent reason.

The conclusion *we* drew is that this action was taken to obtain product to be channeled to new or other outlets.

COMPARATIVE REPORT OF PERCENTAGE OF INCREASE OR DECREASE IN TAXABLE GASOLINE SALES FOR CALENDAR YEAR 1971-1972 AND FIRST SIX MONTHS OF 1972-1973

	Percent of Taxable Sales 1971-72	Percent of Taxable Sales 6 Months 1972-73
Exxon Corporation	1%	6%
Amoco Oil Company	4%	4%
Shell Oil Company	4%	13%
Gulf Oil Corporation	15%	11%
BP Oil Corporation	2%	6%
Texaco, Incorporated	9%	5%
Sun Oil Co. of Pennsylvania	4%	.003%
Cities Service Oil Co.	- 3%	- 6%
Crown Central Petroleum Corp.	32%	30%
Ashland Oil, Inc.	19%	- 23%
Amerada Hess Corp.	10%	- 5%
Atlantic Richfield Company	- 25%	11%
Mobil Oil Corporation	8%	7%
Petroleum Marketing Corp.	84%	8%
Continental Oil Company	- 35%	25%
Phillips Petroleum Corp.	16%	- 16%
Southern States Coop., Inc.	7%	13%
Tenneco Oil Co.	- 6%	- 17%
Getty Oil Corporation	11%	3%

MAJOR OIL COMPANY PERCENTAGE OF THE MARYLAND MARKET OF TAXABLE GASOLINE SALES

	Percent of Market Calendar 1971	Percent of Market Calendar 1972	Percent of Market 1st 6 Months 1973
Exxon Corporation	18%	17%	18%
Amoco Oil Company	10%	10%	10%
Shell Oil Company	9%	8%	9%
Gulf Oil Corporation	7%	8%	8%
BP Oil Corporation	7%	7%	7%
Texaco, Incorporated	6%	6%	6%
Sun Oil Co. of Pennsylvania	4%	4%	4%
Cities Service Oil Co.	4%	4%	3%
Crown Central Petroleum Corp.	3%	4%	4%
Ashland Oil, Inc.	3%	4%	3%
Amerada Hess Corp.	3%	4%	3%
Atlantic Richfield Company	3%	3%	3%
Mobil Oil Corporation	3%	3%	3%
Petroleum Marketing Corp.	2%	3%	3%
Continental Oil Company	2%	1%	1%
Phillips Petroleum Corp.	1%	1%	1%
Southern States Coop., Inc.	1%	1%	1%
Tenneco Oil Co.	1%	1%	1%
Getty Oil Corporation	1%	1%	less than 1%
	88%		91%

2 major companies share less than 1%

96 branded independent dealers share was 8%

12 independent unbranded dealers share was 2%

DEFENDANTS' EXHIBIT F

A BILL ENTITLED

AN ACT to repeal and re-enact with amendments, Section 157E of Article 56 of the Annotated Code of Maryland (1972 Replacement Volume), title "Licenses," subtitle "Motor Vehicle Fuel Tax," to prohibit producers, refiners, and wholesalers of petroleum products from operating retail service stations and regulating voluntary allowances and rental agreements.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section 157E of Article 56 of the Annotated Code of Maryland (1972 Replacement Volume), title "Licenses," subtitle "Motor Vehicle Fuel Tax," be and is hereby repealed and re-enacted, with amendments, to read as follows:

§157E. Declaration or statement by wholesalers, refiners, manufacturers, jobbers and dealers.

(A) For the purpose of this law all gasoline and special fuels sold or offered or exposed for sale shall be subject to inspection and analysis as hereinafter provided. All motor fuel wholesalers, diesel fuel sellers, heating oil distributors, manufacturers, refiners, jobbers and retail service station dealer before selling or offering for sale any gasoline, other motor vehicle fuels, or special fuels under whatever name designated for power and heating purposes shall file with the Comptroller of the Treasury a declaration or statement that they desire to sell such products in this State and shall furnish the name, brand or trademark of the products which they desire to sell together with the name and address of the supplier thereof and that all such products are in

conformity with the specifications established by the Comptroller of the Treasury, as purchased from the supplier and he will make no alteration to any such product received from the supplier.

(B) AFTER JULY 1, 1974, NO PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPEN AND OPERATE WITH COMPANY PERSONNEL, A RETAIL SERVICE STATION UNDER A MAJOR BRAND, SECONDARY OR UNBRANDED STATION.

(C) AFTER JULY 1, 1975, NO PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPERATE ANY CLASS OF RETAIL SERVICE STATION IN THE STATE OF MARYLAND.

(D) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL EXTEND ALL VOLUNTARY ALLOWANCES UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(E) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL APPLY ALL EQUIPMENT RENTALS UNIFORMLY TO ALL RETAIL SERVICE STATIONS DEALERS SUPPLIED.

(F) EVERY PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL APPORTION UNIFORMLY ALL GASOLINE AND SPECIAL FUELS TO ALL RETAIL SERVICE STATION DEALERS DURING PERIODS OF SHORTAGES.

DEFENDANTS' EXHIBIT G

January 7, 1974

Honorable Marvin Mandel
Governor of Maryland
State House
Annapolis, Maryland 21404

Dear Marvin:

I am enclosing two (2) Bills which I would like to have introduced in this Session of the General Assembly.

The first Bill would prohibit producers, refiners, and wholesalers of petroleum products from operating retail service stations and would regulate voluntary allowances and rental agreements.

The second Bill would prohibit giveaways by dealers, sellers, and retail service station operators.

As you will recall, I have discussed these Bills with you on several occasions and I sent copies of them to you on September 13, 1973.

If you should have any questions, I will be free to discuss this with you further at any time.

With kindest regards and best wishes, I am,

Cordially yours,

Louis L. Goldstein

LLG:bdz
Encs.
cc: Mr. Alan Wilner

DEFENDANTS' EXHIBIT H

SENATE OF MARYLAND
No. 465

By: Senator Pine (Departmental)
Introduced and read first time: January 31, 1974.
Assigned to: Economic Affairs

A BILL ENTITLED

AN ACT concerning

Licenses – Retail Service Stations

FOR the purpose of prohibiting producers, refiners, and wholesalers of petroleum products from operating retail service stations and regulating voluntary allowances and rental agreements.

BY repealing and re-enacting, with amendments,

Article 56 – Licenses
Section 157E
Annotated Code of Maryland
(1972 Replacement Volume and 1973 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section 157E of Article 56 – Licenses, of the Annotated Code of Maryland (1972 Replacement Volume and 1973 Supplement) be and it is hereby repealed and re-enacted, with amendments, to read as follows:

Article 56 – Licenses

157E.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW. [Brackets] indicate matter deleted from existing law. Numerals at right identify computer units of text. Slashes indicate the beginning of a computer unit.

(A) For the purpose of this law all gasoline and special fuels sold or offered or exposed for sale shall be subject to inspection and analysis as hereinafter provided. All motor fuel wholesalers, diesel fuel sellers, heating oil distributors, manufacturers, refiners, jobbers and retail service station dealer before selling or offering for sale any gasoline; other motor vehicle fuels, or special fuels under whatever name designated for power and heating purposes shall file with the Comptroller of the Treasury a declaration or statement that they desire to sell such products in this State and shall furnish the name, brand or trademark of the products which they desire to sell together with the name and address of the supplier thereof and that all such products are in conformity with the specifications established by the Comptroller of the Treasury, as purchased from the supplier and he will make no alteration to any such product received from the supplier.

(B) AFTER JULY 1, 1974, NO PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPEN AND OPERATE WITH COMPANY PERSONNEL, A RETAIL SERVICE STATION UNDER A MAJOR BRAND, SECONDARY OR UNBRANDED STATION.

(C) AFTER JULY 1, 1975, NO PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPERATE ANY CLASS OF RETAIL SERVICE STATION IN THE STATE OF MARYLAND.

(D) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL EXTEND ALL VOLUNTARY ALLOWANCES UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(E) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL APPLY ALL EQUIPMENT RENTALS UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(F) EVERY PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL APPORTION UNIFORMLY ALL GASOLINE AND SPECIAL FUELS TO ALL RETAIL SERVICE STATION DEALERS DURING PERIODS OF SHORTAGES ON AN EQUITABLE BASIS, AND SHALL NOT DISCRIMINATE AMONG THE DEALERS IN THEIR ALLOTMENTS.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1974.

DEFENDANTS' EXHIBIT I

HOUSE OF DELEGATES
No. 918

By: Delegate Bonvegna
Introduced and read first time: February 18, 1974.
Assigned to: Economic Matters

A BILL ENTITLED

AN ACT concerning

Licenses – Retail Service Stations

FOR the purpose of prohibiting producers, refiners, and wholesalers of petroleum products from operating

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW. [Brackets] indicate matter deleted from existing law. Numerals at right identify computer units of text. Slashes indicate the beginning of a computer unit.

retail service stations and regulating voluntary allowances and rental agreements.

BY repealing and re-enacting, with amendments,

Article 56 - Licenses
Section 157E
Annotated Code of Maryland
(1972 Replacement Volume and 1973 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section 157E of Article 56 – Licenses, of the Annotated Code of Maryland (1972 Replacement Volume and 1973 Supplement) be and it is hereby repealed and re-enacted, with amendments, to read as follows:

Article 56 – Licenses

157E.

(A) For the purpose of this law all gasoline and special fuels sold or offered or exposed for sale shall be subject to inspection and analysis as hereinafter provided. All motor fuel wholesalers, diesel fuel sellers, heating oil distributors, manufacturers, refiners, jobbers and retail service station dealer before selling or offering for sale any gasoline; other motor vehicle fuels, or special fuels under whatever name designated for power and heating purposes shall file with the Comptroller of the Treasury a declaration or statement that they desire to sell such products in this State and shall furnish the name, brand or trademark of the products which they desire to sell together with the name and address of the supplier thereof and that all such products are in conformity with the specifications established by the Comptroller of the Treasury, as purchased from the supplier and he will make no alteration to any such product received from the supplier.

(B) AFTER JULY 1, 1974, NO PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRO-

DUCTS SHALL OPEN AND OPERATE WITH COMPANY PERSONNEL, A RETAIL SERVICE STATION UNDER A MAJOR BRAND, SECONDARY OR UNBRANDED STATION.

(C) AFTER JULY 1, 1975, NO PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPERATE ANY CLASS OF RETAIL SERVICE STATION IN THE STATE OF MARYLAND.

(D) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL EXTEND ALL VOLUNTARY ALLOWANCES UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(E) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL APPLY ALI EQUIPMENT RENTALS UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(F) EVERY PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL APPORTION UNIFORMLY ALL GASOLINE AND SPECIAL FUELS TO ALL RETAIL SERVICE STATION DEALERS DURING PERIODS OF SHORTAGES ON AN EQUITABLE BASIS, AND SHALL NOT DISCRIMINATE AMONG THE DEALERS IN THEIR ALLOTMENTS.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1974.

DEFENDANTS' EXHIBIT K-1

STATEMENT OF JAMES E. GRADY
PUBLIC AFFAIRS MANAGER, EXXON COMPANY,
U.S.A., EASTERN REGION
BEFORE SENATE ECONOMIC AFFAIRS COMMITTEE
FEBRUARY 20, 1974

Senate Bill 465
Major Oil Companies Being Prohibited From Operating
Retail Service Stations in Maryland

Mr. Chairman, gentlemen, I would like to take about five minutes to explain why Exxon operates a small percentage of their stations on a direct basis. I'll then spend a similar amount of time on the sections of SB-465 pertaining to allocations, promotions and price assistance. I'll close my prepared remarks with a brief reference to the long range effects that this bill could have on the mobility and economy of the citizens of this state.

DIVORCEMENT

For many years, Exxon's Retail Store Chain has included some stores operated by company employees, based on the belief that a diversity of markets and customers as well as the obligations imposed by federal, state and local regulatory agencies indicate that Exxon can best serve its customers using a mixture of different types of stores and marketing methods.

Legislation which would restrict the ability of a corporation to efficiently serve its customers is drastic

and inconsistent with the public welfare. In order for such legislation to be necessary, there would have to be serious widespread abuses in the marketplace and Exxon knows of no such occurrences. Certainly appropriate action could be taken under existing laws to remedy any isolated cases of abuse.

There are many sound business reasons why Exxon operates part of its store chain on a direct basis. *First,* stores are company operated to satisfy contractual agreements with various regulatory agencies. As an illustration, Exxon's agreement with the Maryland Highway Administration on J.F.K. Memorial Highway specifies that certain operating standards (24-hour service, road service and patrols) be maintained. Since we would have no legal control over a dealer operation, Company operation ensures that Exxon can and does meet these contractual requirements. This bill would absolve one contract with the state three years before its expiration date. *Second,* some stations are company operated on a temporary basis. In this instance, Exxon elects to operate the store with salary employees rather than close it when a dealer dies, or otherwise leaves unexpectedly. This approach is quite beneficial to the customer, because it permits him to continue enjoying the convenient use of a particular location. It is also beneficial to the incoming dealer since it assures him of customer continuity. Further, the incoming dealer may elect to attend the company's six-week service station management training course, thus enhancing his chances for success, if he knows the store can be company operated during this period. Last year we obliged dealers 9 times in this manner here in Maryland. Presently we are operating 3 on a temporary basis. *Third,* stores are sometimes company operated because

such operation permits Exxon to test and evaluate merchandising techniques, operating procedures, financial control systems, and equipment, as well as train retailers and sales personnel. Much of what is learned at company-operated stores, in terms of operating methods and management techniques, is then passed along to the independent dealer business man in the form of counseling to assist him in operating his business more profitably. *Fourth,* innovative stores, using new marketing concepts are often operated by the company. These include car care centers, car washes, and self-serve units. Exxon operates these stores on a direct basis because of the relatively high initial investment (in many cases in excess of $500,000); the complex nature of store operation (car care centers); the need to ensure that high-cost equipment is safely operated and efficiently maintained (car washes). *Fifth,* Exxon uses the direct method of operation in some instances because it is the most efficient method of serving our customers. Self-service stores provide an excellent illustration of this point. In most cases only one employee per shift is required to staff a normal sized self-service store. Since these people are company employees, they can be supervised by one field representative who moves about the marketplace overseeing operations, and performing the administrative and management activities for several stores. Obviously, this type of efficiency manifests itself in reduced prices to the consumer. It is unlikely that Exxon would invest in costly complex facilities designed to meet specific customer demand, such as a car wash, without the assurance that these stores would be operated under the direct supervision of company employees.

Exxon believes that company operation of selected stores has various advantages to the customer, to

employees who work at these stores and to Exxon's independent dealer businessmen throughout the country. For example, company-operated stores are monitored by a retail store supervisor who evaluates store appearance, operating hours and customer service to improve performance where required. Working with the manager, the supervisor ensures that the store is adequately stocked with a full range of products and equipped to provide the services for which the facility was designed. All of these efforts are aimed at benefitting the consumer.

Sixth, company-operated stores are also used as training schools. Employees who work or attend classes there have an opportunity to learn the business of petroleum retailing. This experience may qualify them to operate their own service station at a future date or go on to a professional career with Exxon. This has been particularly valuable for minorities. 15 have left our stores in the recent past for their own station or careers with the company right here in Maryland. Nearly 50 are presently being trained.

Company operations also have advantages for existing dealers. As mentioned above, many dealers learned petroleum retailing first as an employee and then as an assistant manager or manager of a company-operated store. With this experience, they were able to secure a dealer station, often borrowing the required investment based on their experience as a company store employee or manager. Also, as previously noted, many systems, procedures and programs which help increase dealer profits were first introduced and tested at company operated stores.

ALLOCATIONS

Charges are often made that company operations permit major oil companies to inequitably distribute products during tight supply, systematically remove dealers when desired, perpetuate give-away programs and control prices. Exxon believes these charges are unfounded.

Our company's policy during tight supply is one of fairly allocating our available product to retail outlets it operates and to those operated by independent dealers. To do this, we have applied the identical criteria to such outlets whether company or dealer operated. Allocations are based on sales history. The method and procedures used to determine product quantities available for all stores during periods of tight supply are identical. If, in fact, specific companies have failed to allocate products fairly to their customers during shortages, corrective action should be taken against those companies at fault rather than all petroleum companies.

PROMOTIONS

Exxon has always recognized the independent dealers right to participate or not in promotions offered at company stores. This is evidenced by the fact that traditionally 20-30% of our dealers elect not to participate in various company-sponsored promotions. As in any other business, competition in the marketplace fosters new and innovative methods of merchandising. Exxon attempts to provide the best merchandising we can for our company stores and offer the same

to our dealers for their operations. Ultimate decisions concerning participation, however, remain with the dealer. Passage of the proposed legislation would prevent those dealers who wish to promote their business from doing so, thus casting doubt on the fairness or desirability of such legislation from the dealer's viewpoint. As far as protecting a dealer from undue supplier pressure to participate in a merchandising program, this legislature accomplished that last spring when you passed the Maryland Gasoline Products Marketing Act.

But even more important today, dealers are being allocated on gasoline and must look elsewhere to make up the loss of income resulting from less gallonage sales. The most appropriate area of additional income is sales of tires, batteries, service and their automotive sales. It would be unthinkable to prevent them from promoting these products without also legislating against the chain stores and automotive outlets with whom they are in competition.

PRICE ASSISTANCE

Allegations that company operations are used as a method of controlling prices and that price assistance is not equitably offered to all retailers are erroneous. Under current regulations, ceiling prices are set by the Cost of Living Council. In the period which preceded federal price control, Exxon set its prices for gasoline sold at retail, as well as all other levels of the marketplace, in response to market forces at work in each individual market. Exxon has never attempted to use its retail outlets to control the retail prices charged

by its dealers. Pricing decisions at dealer-operated stores are made by the dealer based on his evaluation of competitive forces in the marketplace. The fact that dealers do make their own pricing decisions is supported by the relatively wide range of prices which may be charged by Exxon dealers in a given market at any particular point in time. For example, a study of Exxon dealers made on December 12, 1973 in Maryland reflected that their retail prices for regular grade gasoline ranged from 40.9 to 45.9 with no more than 48% at any one posted price, despite the fact that they paid a common wholesale price for the product.

Exxon's price assistance plan for dealers and price administration procedures at company-operated stores have been fairly and uniformly applied based on competitive conditions in the marketplace. Suggestions that legislation be enacted which would require that companies extend price support offered in one geographic trading area, to a whole state constitutes local government price regulation and is contrary to the system of free competition fostered by the Anti-Trust laws. Further, this type of price regulation can result in consumers paying higher prices for products, over a given time period, or to a situation where consumers in one part of the state subsidize consumers in another location. Finally, this legislation is clearly not in the best interest of service station dealers because the potential economic liability of a statewide price reduction could result in supplier reluctance to offer assistance in cases where only a few dealers require such support to meet competitive conditions. For example, if two or three of our dealers in the extreme western portion of the state could prove serious price competition from sources originating in Pennsylvania or

West Virginia, we could currently justify a discount to keep these dealers in business during the price war. But, if this legislature would require us to give the same discount to all 570 Exxon stations in the state, I'm afraid these Garrett or Allegheny dealers would have to survive as best they could – if they could. This is strictly hypothetical. We could be talking about dealers in Montgomery or Prince Georges Counties in identical situations.

In summary, charges that company operations promote inequitable product allocation, dealer lease cancellation, perpetrate give-away programs and are used as a method of controlling prices are simply unfounded. Certainly, existing laws provide excellent remedies in the limited instances where such abuses might occur. Additionally, direct store operation, in many cases, provides the most efficient, least costly method of satisfying customer demand. Therefore, Exxon believes the proposed legislation is unneeded and totally anticonsumer for you would be taking the unprecedented step of removing by legislation a choice that belongs to the Maryland motorist, as well as removing vigorous competitors from the marketplace.

We also believe that by passing this bill, the General Assembly would be placing itself in the unenviable position of having to pass a whole series of bills – or delegate unprecedented powers to the Comptroller – to fix by regulation what you are removing by restricting competition. That is, convenience for the Maryland motorist in days and hours of operation, standards of service and cleanliness, complaint handling and customer satisfaction.

Finally, this legislation closes its eyes to the evolution currently taking place in gasoline retailing.

The nation is adopting a new conservation ethic, smaller cars, car pooling, more efficient driving patterns.

The dealer association has claimed that 231 dealers have gone out of business due to the energy shortage and 500 more are expected to fold by the end of February. We don't agree with these numbers, but if a trend does develop, we should not be prevented from keeping certain of these outlets open on a salary basis where the public is dependent on them.

The development and introduction into the marketplace of new synthetic fuels as the finite supply of liquid petroleum grows more scarce, requires more rather than less flexibility in order to secure the future needs of Maryland.

Our concern, our investments, our planning, are motivated by long range considerations. We were in the Maryland market at the turn of this century. We hope to be in this market at the turn of the next century and those that follow. We simply ask you to consider these future problems as well before taking action that could place Maryland at a serious disadvantage with relation to surrounding states when it comes to energy.

Other commodities sold through dual distribution (dealer and direct).

Automotive supplies (tires, mufflers, etc.)
Appliances (TV)
Business machines and forms
Building materials
Books and magazines
Fencing, tanks and other steel products
Fertilizer
Furniture
Glass

Hearing Aids
Heating oil and equipment
Ice cream
Insurance
Insulation
Jewelry
Lawn mowers and tractors
Paint
Pianos and Organs
Suits and dresses
Shoes
Silverware
and, Bibles

DEFENDANTS' EXHIBIT K-2

STATEMENT OF JAMES E. GRADY
PUBLIC AFFAIRS MANAGER, EXXON COMPANY,
U.S.A., EASTERN REGION
BEFORE HOUSE ECONOMIC MATTERS COMMITTEE
MARCH 7, 1974

HOUSE BILL 918
Major Oil Companies Being Prohibited From Operating
Retail Service Stations in Maryland

Mr. Chairman, gentlemen, I would like to take about five minutes to explain why Exxon operates a small percentage of their stations on a direct basis. Then a shorter statement on the sections of HB-918 pertaining to allocations and price assistance. I'll close my

prepared remarks with a brief reference to the long range effects that this bill could have on the mobility and economy of the citizens of this state.

DIVORCEMENT

For many years, Exxon's Retail Store Chain has included about 5 to 10% of their stores operated by Company employees, based on the belief that a diversity of markets and customers as well as the obligations imposed by federal, state and local regulatory agencies indicate that Exxon can best serve its customers using a mixture of different types of stores and marketing methods.

Legislation which would restrict the ability of a corporation to efficiently serve its customers is drastic and inconsistent with the consumer's welfare. In order for such legislation to be necessary, there would have to be serious widespread abuses in the marketplace and Exxon knows of no such occurrences. Certainly appropriate action could be taken under existing laws to remedy any isolated cases of abuse.

There are six basic business reasons why Exxon operates part of its store chain on a direct basis. *First*, stores are Company operated to satisfy contractual agreements with various regulatory agencies. As an illustration, Exxon's agreement with the Maryland Highway Administration on J.F.K. Memorial Highway specifies that certain operating standards (24-hour service, road service and patrols) be maintained. Since we would have no legal control over a dealer operation, Company operation ensures that Exxon can and does meet these contractual requirements. This bill would

absolve our contract with the State three years before its expiration date. *Second,* some stations are Company operated on a temporary basis. In this instance Exxon elects to operate the store with salary employees rather than close it when a dealer dies, or otherwise leaves unexpectedly. This approach is quite beneficial to the customer, because it permits him to continue enjoying the convenient use of a particular location. It is also beneficial to the incoming dealer since it assures him of customer continuity. Last year we obliged dealers 9 times in this manner here in Maryland. Presently we are operating 2 on a temporary basis. If not – under FEO – gallonage would be lost to state. *Third,* stores are sometimes Company operated because such operations permits Exxon to test and evaluate merchandising techniques, operating procedures, financial control systems, and equipment. All of what is learned at Company-operated stores, in terms of operating methods and management techniques, is then passed along to the independent dealer businessman in the form of counseling to assist him in operating his business more profitably. *Fourth,* innovative stores, using new marketing concepts are often operated by the Company. These include car care centers, car washes, and self-serve units. Exxon operates these stores on a direct basis because of the relatively high initial investment (in most cases in excess of $500,000); the complex nature of store operation (car care centers); and the need to ensure that high-cost equipment is safely operated and efficiently maintained (car washes). *Fifth,* Exxon uses the direct method of operation in some instances because it is the most efficient method of serving our customers. Self-service stores provide an excellent illustration of this point. In most cases only one employee per shift is required to staff a normal

sized self-service store. Since these people are Company employees, they can be supervised by one field representative who moves about the marketplace overseeing operations, and performing the administrative and management activities for several stores. Obviously, this type of efficiency manifests itself in reduced prices to the consumer.

Sixth, Company-operated stores are also used as training schools. Employees and Dealers who work or attend classes there have an opportunity to learn the business of petroleum retailing. This experience may qualify them to operate their own service station at a future date or go on to a professional career with Exxon. This has been particularly valuable for minorities. 15 have left our stores in the recent past for their own station; or professional careers with the Company right here in Maryland. Several dozen are presently being trained and there is no other legal way to accommodate them.

ALLOCATIONS

Charges are often made that Company operations permit major oil companies to inequitably distribute products during tight supply, systematically remove dealers when desired, perpetuate give-away programs and control prices. Exxon believes these charges are completely unfounded.

Our Company's policy during tight supply is one of fairly allocating our available product to all retail outlets. To do this, we have applied the identical criteria to such outlets whether Company or dealer operated. Allocations are based on sales history. The

method and procedures used to determine product quantities available for all stores during periods of tight supply are identical. If, in fact, specific companies have failed to allocate products fairly to their customers during shortages, corrective action should be taken against those companies at fault rather than all petroleum companies.

PRICE ASSISTANCE

Allegations that Company operations are used as a method of controlling prices and that price assistance is not equitably offered to all retailers are erroneous. In the period which preceded federal price control, Exxon set its prices for gasoline sold at retail, as well as all other levels of the marketplace, in response to market forces at work in each individual market. Exxon has never attempted to use its retail outlets to control the retail prices charged by its dealers. Pricing decisions at dealer-operated stores are made by the dealer alone. The fact that dealers do make their own pricing decisions is supported by the relatively wide range of prices which may be charged. For example, a study of Exxon dealers made on December 12, 1973 in Maryland reflected that their retail prices for regular grade gasoline ranged from 40.9 to 45.9 with no more than 48% at any one posted price, despite the fact that they paid a common wholesale price for the product.

Exxon's price assistance plan for dealers and price administration procedures at Company-operated stores have been fairly and uniformly applied based on competitive conditions in the marketplace. Suggestions that legislation be enacted which would require that

companies extend price support offered in one geographic trading area, to a whole state constitutes local government price regulation and is contrary to the system of free competition fostered by the Anti-Trust laws. Further, this type of price regulation can result in consumers paying higher prices for products, over a given time period, or to a situation where consumers in one part of the state subsidize consumers in another location. Finally, this legislation is clearly not in the best interest of service station dealers because the potential economic liability of a statewide price reduction could result in supplier reluctance to offer assistance in cases where only a few dealers require such support to meet competitive conditions. For example, if two or three of our dealers in the extreme western portion of the state could prove serious price competition from sources originating in Pennsylvania or West Virginia, we could currently justify a discount to keep these dealers in business during the price war. But, if this legislature would require us to give the same discount to all 570 Exxon stations in the state, I'm afraid these Garrett or Allegheny dealers would have to survive as best they could – if they could. This is strictly hypothetical. We could be talking about dealers in Montgomery or Prince Georges Counties in identical situations.

In summary, charges that Company operations promote inequitable product allocation, dealer lease cancellation, perpetrate give-away programs and are used as a method of controlling prices are simply unfounded. Certainly, existing laws provide excellent remedies in the limited instances where such abuses might occur. Additionally, direct store operation, in many cases, provides the most efficient, least costly

method of satisfying customer demand. Therefore, Exxon believes the proposed legislation is unneeded and totally anti-consumer for you would be taking the unprecedented step of removing by legislation a choice that belongs to the Maryland motorist, as well as removing vigorous competitors from the marketplace.

We also believe that by passing this bill, the General Assembly would be placing itself in the unenviable position of having to pass a whole series of bills – or delegate unprecedented powers to the Comptroller – to fix by regulation what you are removing by restricting competition. That is, convenience for the Maryland motorist in days and hours of operation, standards of service and cleanliness, complaint handling and customer satisfaction.

Finally, this legislation closes its eyes to the evolution currently taking place in gasoline retailing. The nation is adopting a new conservation ethic, smaller cars, car pooling, more efficient driving patterns.

The dealer association has claimed that 231 dealers have gone out of business due to the energy shortage and 500 more were expected to fold by the end of February. We don't agree with these numbers, but if a trend does develop, we should not be prevented from keeping certain of these outlets open on a salary basis where the public is dependent on them and again to prevent the loss of this gallonage to a national pool.

The development and introduction into the marketplace of new synthetic fuels as the finite supply of liquid petroleum grows more scarce, requires more rather than less flexibility in order to secure the future needs of Maryland motorists.

Our concern, our investments, our planning are

motivated by long range considerations not by today's environment. We were in the Maryland market at the turn of this century. We hope to be in this market at the turn of the next century and those that follow. We simply ask you to consider these future problems as well, before taking action that could place Maryland at a serious disadvantage with relation to surrounding states, when it comes to energy.

In addition, you would be giving the dealer association the muscle to carry off their frequently threatened shut downs and march on Washington – or rally at Lake Montebello. They know this will not work with Company stores in the marketplace because no major oil company would accept that kind of irresponsible conduct be imposed on the Maryland motorist.

Other commodities sold through dual distribution (dealer and direct).

Automotive supplies (tires, mufflers, etc.)
Applicances (TV)
Business machines and forms
Building materials
Books and magazines
Fencing, tanks and other steel products
Fertilizer
Furniture
Glass
Hearing Aids
Heating Oil and equipment
Ice Cream
Insurance
Insulation
Jewelry
Lawn mowers and tractors

Paint
Pianos and Organs
Suits and dresses
Shoes
Silverware
and Bibles

DEFENDANTS' EXHIBIT K-3

STATEMENT OF SHELL OIL COMPANY
ON
MARYLAND HOUSE BILL 918

PRESENTED TO
THE ECONOMIC MATTERS COMMITTEE
MARCH 7, 1974

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Mr. Chairman, my name is Frank Goeyvaeris. I am District Manager for Shell Oil Company with offices in College Park. I am responsible for 198 Shell service stations in the State of Maryland.

Shell appreciates the opportunity to present its views on House Bill 918. The Bill, which would prohibit producers, refiners and wholesalers of petroleum products from operating retail service stations, is plainly discriminatory against the service station and petroleum industries. If passed in its present form, it would hurt the operations of the present independent service station dealers, his supplying companies and the citizens of the State of Maryland.

I would like to take a few moments to discuss some of the problems, and very briefly, some of the legal arguments which would arise if this Bill is passed in its present form. Apparently, this Bill's purpose is to protect the independent service station dealer and to assure that he will remain a viable part of the service station industry.

We feel that the independent dealer or businessman has a very important place and a future in our business. We have leased our stations to dealers for over 50 years. We have found this arrangement to be very profitable for both of us.

It is important to note that out of the total 9100 Shell service stations in this country, less than three percent are operated with company employees. And in Maryland, only one unit of 198 is operated by company personnel.

While it is evident that we have not concentrated on company operated units, we would like to retain the right to operate certain units as company stores if we feel it necessary.

If this Bill is passed we would not have that right and it would clearly discriminate against the petroleum industry since other types of industry would not be affected. Integrated industries such as Sears, Ford, General Motors, A&P, and lesser integrates like the McDonalds, the Kentucky Fried Chickens, the Western Autos, and others, would retain the right to operate their own properties.

There are several reasons why Shell Oil Company utilizes this manner of operation in addition to dealer operations. One is the vast amounts of capital that may have been invested in a single unit, e.g., car-care centers, car washes, combination/restaurant facilities. The capital necessary for these improvements and property is so great it could very well be that Shell could elect not to invest in these units unless it were assured it had an equal opportunity to operate the stores in the future.

Shell operates service stations as training centers for new and prospective managers and they are also utilized

for the purpose of trying out new marketing concepts and techniques. These are then passed on to Shell's dealers to help them improve their business.

There are instances where we have to operate a unit. Occasionally a service station dealer vacates the premises abruptly and it is necessary to provide machinery that can be implemented to continue the operations of the unit. We normally employ temporary help in this instance and in view of today's Federal allocation program, the station would continue with a supply of gasoline which would be available to the citizens of Maryland.

The purpose of any viable business is to make a profit and an equitable return to its shareholders. In light of this consideration, it could be ascertained that a corporation failing to make an adequate return on its investment would look for other opportunities in other areas of the country that would be more receptive to these types of investments.

Gentlemen, this isn't idle speculation. One has to look at the overall picture when evaluating the results of this Bill.

Equally important we should explore some of the legal arguments against House Bill 918.

Shell's counsel has concluded that the Bill is in conflict with the Constitution of Maryland on several counts. It is so clearly an over-exercise of the police power as to constitute nothing short of confiscation by legislation.

The Bill violates the guarantee of due process appearing in Article 23 of the Maryland Declaration of Rights. Virtually overnight, the Bill would convert a legitimate retail business into a damnable nuisance. This

would be without any showing, or any attempt to show, that the business in question, as conducted now or in the past, has brought about any distinctive and substantial evil or peril which would properly be subject to so total an exercise of the police power.

In addition HB 918 denies the equal protection promised by Article 23. It would bar even the smallest of producers and refiners from conducting as much as a single retail operation: yet, (if the Senate Committee amendments to Senate Bill 465 becomes part of this Bill,) wholesalers, no matter how large and resourceful, would be permitted to conduct as many retail units as they choose. Indeed limiting market expansion to wholesalers and retailers well might be in conflict with Article 41 of Maryland's Declaration of Rights which states that "monopolies are odious" and "not to be suffered."

Shell has researched and rejected the Comptroller's contention that Maryland's existing prohibition against the operation of retail liquor stores by wholesalers[1] provides the constitutional basis for a similar ransacking of the petroleum industry. So-called "tied-shops" have been prohibited in a number of states for several years, but it remains a large and open question as to whether these prohibitions are constitutional. It is evident from the few decided cases that this question has only occasionally been raised and has rarely, if ever, been given the careful and scholarly consideration by the courts which it deserves. (One high court, for instance, brushed aside the issue of constitutionality with the

[1]Chapter 501, Laws of 1947; Chapters 404 and 725, Laws of 1972.

mere observation that the matter "... is scarcely any longer debatable."[2]

Perhaps the liquor industry has been tolerant of these impositions because Section 2 of the 21st Amendment to the U.S. Constitution gave special constitutional status to intra-state regulation of liquor during the period following prohibition; or possibly it was because alcoholic beverages, by anybody's definition, involve a certain immediate threat to the health and safety of the community.[3] However, whatever the reasons for such strict control of the liquor traffic, even if they were finally put to the constitutional test and were to pass that test, the same reasons would not be applicable to the petroleum industry.

One further point should be made regarding the content of Maryland's prohibition of tied liquor stores. As most recently re-enacted in the 1972 session, the liquor law prohibits the wholesaler from "... lending any money or other thing of value to the retailer." This limitation, if applied fairly and equally to the petroleum industry, would probably bankrupt scores of Shell's dealers. It could bring about a situation where dealers would be forced to close and because their suppliers would be barred from operating the station with company personnel, the gallonage in the State would be decreased under terms of FEO regulations.

[2]*Lewer v. Cornelius* (1913), 72 Wash. 124, 129 P. 911.

[3]A leading Maryland case on this subject, *Dundalk Liquor v. Tawes*, 201 Md. 58, refers to "exceptional problems" in controlling liquor, and makes it clear (at page 67) that it is only because of the 21st Amendment, and not because of any other inherent constitutional power, that the state can erect barriers to the liquor traffic. Thus, even if extraordinary powers do exist, they would not be constitutional when aimed at other industries.

There is also a question of necessity here. The Bill does not state its policy or rationale, but it seems to arise out of a certain concern that the petroleum refiners and producers are bent on monopolizing the local retail market.

As we've pointed out earlier, Shell has one company-operated station out of 198 in the State of Maryland. Surely it is self evident that we have not contemplated nor do we anticipate any massive shift from lease to salary operations. Could there be any question but that the problem can be dealt with, when and if it does arise, by resort to Maryland's own anti-trust act?[4] This Act, just passed, equips the Attorney General, and private citizens, including every dealer and jobber in Maryland, with a variety and battery of remedies for combating monopolistic activities. The remedies include 6 months' imprisonment and $500,000.00 fines for each offense (Section 40), as well as such extraordinary remedies as "divestiture of property, divorcement of business units, and suspension or termination of the right of foreign corporations . . . to do business in . . . Maryland" (Section 41(1)). Further legislation, eliminating an imagined monopoly, is not needed.

The effective date of the prohibition would raise a second grave constitutional question even if the prohibition itself were found to be constitutional. As most committee members probably recall from past involvement in local zoning matters, there is a concept of "non-conforming uses" which requires that existing uses be allowed to remain for a reasonable period following prohibition of new uses. House Bill 918, by

[4]Chapter 357, Maryland Laws of 1972.

allowing little more than a year for the abandonment of existing and projected uses, would be equivalent to an uncompensated taking of unpardonable proportions affecting large sums of monies in real property. It might be possible to avoid the need to compensate for this taking by granting the sort of 15 to 20 year amortization period appearing in typical municipal ordinances.

Another legal point comes to mind with regard to the possible effect of the proposed prohibition. It is not always fully appreciated just how independent Shell's lessee dealers really are. The business at the premises is theirs, not Shell's; and Shell has very little control over the premises during the firm three year term of the lease. This means, to posit a very relevant and frightening example, that if the boycott of the public threatened by station operators had actually taken place last week (at the very time the Governor was asking the Federal court for 20 million more gallons of gasoline), Shell would not have had the means, or the legal right, to wrest control of the stations from dealers and re-open with company personnel. All that Shell could have done to continue getting product to the public would have been to keep Shell's one company station open 24 hours a day and to hope that those with emergency needs had enough gas in their tanks to get them to this facility.

However, under this proposed provision, we would not have been able to have even this one station open. Perhaps, it would be more logical and more consistent with the pleadings and bleatings of Maryland's leaders, for House Bill 918 to require that the companies have still more company operations so that they will be

better equipped to handle emergencies through continued operations of existing company facilities.

In sum, Shell considers House Bill 918 and its companion Senate Bill 465 to be an attempt, on behalf of a single and sometimes inadequate but never inactive sector of the petroleum industry, to eliminate an evil that does not exist by resort to means which violate the United States Constitution, the Constitution of Maryland, and the best interests of Maryland's good citizens.

In conclusion, we would like to emphasize that this Bill in its present form would discourage the oil companies from expanding the marketing operations in the State of Maryland. It would be clearly discriminatory against the petroleum industry while other retail businesses would retain the right to open and operate company units as they so desired.

We do not feel that there is a need for this Bill. We sincerely hope that your committee will give this Bill an unfavorable report.

Thank you.

DEFENDANTS' EXHIBIT K-4

STATEMENT
of
VIC RASHEED
before the
ECONOMIC MATTERS COMMITTEE

My name is Vic Rasheed and I am Executive Director of the Greater Washington/Maryland Service Station Association which represents almost 700 service station dealers in Maryland.

I would like to begin by telling you gentlemen that these are desperate days for service station dealers. Dedicated to public service many dealers are being forced to watch helplessly as the business they have built up over the past years, with long hours of prolonged toil and exhausting effort, decline and become marginal as the energy crisis cuts their allocation of gasoline drastically.

In the meantime, even as gallonage decreases drastically, some companies persist in forcing dealers to pay large amounts of 'make up' rents which is the difference between minimum rent figures (based on a projected gallonage sales figure) and the actual amount the company is able to supply the dealer during a particular month.

For example one dealer whose minimum rent is based on a 90,000 gallon per month sales minimum, but has been allocated only 60,000 gallons, must still pay the difference based on 1.8 cents per gallon, or $540 per month in make-up rent.

Efforts by my association and others, including

Governor Mandel who wrote a letter to oil companies involved in this practice deploring their actions, have been of no avail.

Now beset by the critical gasoline supply situation, the squeeze by his landlord-supplier and the shrinking service and tire, battery and accessory market, the dealer is now faced with an even more serious problem.

That is the sinister threat of the major oil companies to complete their takeover of the retail-marketing of gasoline, not just to be in competition with their own branded dealers, but to squeeze them out and convert their stations to company operation.

In fact they are using the energy crisis not just to amass record profits but to complete their total control of retail marketing and remove their last vestige of competition left in the industry to add new profits.

The Conference Report (93-628) on S. 1570 (Emergency Petroleum Allocation Act of 1973) states:

> "... the committee wants to express its concern with the downstream vertical integration of the major oil companies into the distribution and retail levels of the market. Major oil companies have begun to market secondary brands through wholly-owned distribution subsidiaries. The primary brands are to an increasing extent being marketed through so-called salaried or managed retail outlets. Branded independent marketers, already under short term lease and supply agreements, are finding that their agreements are not being renewed. Leases of one year's duration are being converted to thirty days. Representatives of branded dealers believe that this represents an attempt by the majors to force private entrepreneurs out of the retail market and to convert station operators to salaried employees. . . ."

The major oil companies, fully aware of the impending energy crisis for the past two years, began to plan for it then, by beginning to eliminate smaller stations and concentrate on fewer, larger outlets to be run by the companies themselves rather than the dealers.

Since the gasoline shortage, the companies have closed many smaller dealer operated outlets and diverted this gasoline to their company-operations. In Prince Georges County Exxon has just been granted zoning for a huge new 10-bay car-care center. The company said it would close two smaller dealer locations nearby in return.

Some locations which pumped perhaps 70,000 gallons as dealer-operations began pumping over 200,000 gallons as company-operations.

Meanwhile dealer-operations ran dry. This has happened in Montgomery County where we read the pump meters of such a station to determine its gallonage. When this was protested, the station was promptly closed for one week since it was in obvious violation of the Federal Manadatory Allocation Regulations.

In the Washington metropolitan area before the Christmas holiday weekend, the company-stations of a certain brand were filled up. These were the only stations able to open during the holidays except for one or two exceptions. This is the type of favoritism which result if the companies are allowed to remain in the retail market.

The companies correctly anticipated the no-competition, captive market situation that we now have in our industry, and decided that selling gasoline would

become a much easier, more profitable, task than in the past and one large outlet could easily pump the volume of 10 smaller ones if it concentrated on gasoline-only. This concept also had the advantage of saving hugh amounts of money in building and equipment maintenance and most of all in the expense of supplying product to only one location instead of ten.

An example of this is the BP move to eliminate its 8,000 dealers to replace them with a limited number of company-operated 'Gas & Go' outlets which sell gasoline only with no service to the motorist.

About one half of these dealers are now out of business and the program is partially stalled in Maryland because of a suit by some of the dealers who are suing to retain their stations rather than turn over the businesses they have built up over the years, intact to BP.

BP incidentally is taking just the prime locations to turn into 'Gas & Go' gasoline only outlets. The others have been given a one-year closed-end lease which means that they will sell or close these stations unless they prove successful and they decide to convert them also to 'Gas & Go'.

In the state of Connecticut and New Jersey where franchise legislation giving some protection and certain rights to the dealers was passed, Mobil promptly began taking over its stations to run them as company-operations. We were informed that Mobil was ready to adopt the same plan in Maryland last year if certain legislation contained in SB 821 was passed.

Exxon has already switched many of its prime locations in Maryland to company-operation. For the past several years, Exxon has been following a policy of

not leasing to dealers, change-over locations which become available and pump good gasoline. Generally anything over 40,000 gallons has been converted to company-operation. Exxon has also been building and operating huge-new 10-12 bay car-care centers throughout Maryland and in fact the whole country. These do sell tires, batteries and accessories and often at the same price their branded dealers have to pay for them. Dealers find that when the wholesaler who supplies them, enters the retail market, in direct competition with them, they cannot compete. In many cities throughout the country, such as Houston, Texas, 90% of the company's stations are already company-operated and the dealers have been forced out.

Exxon like almost every other major oil company, has also entered the secondary-brand market with the Alert brand, again using the gas-only theme. Company-operated, these stations have been built across the street in some instances from Exxon dealers with the expected results. The dealer is soon forced out of business by the lower-priced secondary brand.

Further compounding the threat of company-operation are the new leases with numerous escape clauses which would void the leases in the face of certain eventualities, such as mandatory allocation or if confronted by certain legislation.

Shell has a clause in its three-year leases to its dealers which simply states that if the company should decide not to continue using dealers in a particular area, the lease can be cancelled at short notice.

Exxon in a new lease to its dealers does not provide an automatic renewal clause in the lease and in fact eliminates it all together. Exxon also has some tricky

language in the lease (paragraph 19 & 21) which is obviously intended as an escape clause in the event of certain restrictive legislation being passed—to allow it to cancel a dealer out.

We would like to point out to the senators that there are presedents for banning a wholesale supplier from competing with his own retail distributor in the retail market in Maryland.

I cite the case of the beer-distributors and the wholesale-whiskey suppliers who are forbidden from competing with their retailers.

Why then should the oil-companies be allowed this special privilege?

When any industry is given a license to establish a monopoly extending from the well-head where the oil is first drawn, to the tankers which transport it across the ocean, to the refineries which process it, through the pipelines which deliver it across the country, through the tank-trucks, through the service-stations which retail it to a captive market; then we have handed over full-control of our nation's jugular vein to a clique of oil-moguls who make policy decisions, directed not by patriotism or the national interest, but by their relentless search for profit and more profit.

When I was in Saudi Arabia last summer I was thrilled by the sight of the world's largest oil fields, the world's largest refinery, the world's largest oil tanks each holding 70 million gallons or enough to last the state of Maryland for 20 days.

I was thrilled because it was American-owned. But where has that 10-cent per barrel of oil been going since it was discovered in 1938?

Not to the U.S. but to Europe and Japan where the companies were able to get four times the price they could get in the U.S. The companies deliberately with held this cheap oil from the U.S. market so as not to compete with and force down the price of their domestically-produced oil. This maneuver, is officially estimated to have cost Americans some $5 billion dollars per year in higher gasoline and heating oil prices. It is also one reason why U.S. oil reserves today are dangerously low to the point that our domestic production is declining each year.

Our oil industry has grown beyond the borders of our country to where its American character has been replaced by a multinational one.

Are the legislators of Maryland now about to let this octupus loose and unrestricted in the state of Maryland, among our small businessmen to devour them? We sincerely hope not.

The men that you see here today are the back-bone of American small business. Their story is typically American. They had the initiative to save and go into business for themselves. They have worked hard in a vital industry. Many now have children in college who one day will be doctors, nurses, lawyers and perhaps even State senators.

We are here today asking you, our own legislators to protect us from an economic giant who would take away our very livelihood and our children's future in its greed for greater profits. Please give us the protection we need to save our stations.

In the Circuit Court for
Anne Arundel County

Exxon Corporation	:	
Plaintiff	:	
v.	:	*Equity No. 22,069*
Marvin Mandel, Governor	:	
et al.,	:	
Defendants	:	

Continental Oil Co., et al.,	:	
Plaintiffs	:	
v.	:	*Equity No. 22,091*
Marvin Mandel, Governor	:	
et al.,	:	
Defendants	:	

Shell Oil	:	
Plaintiff,	:	
v.	:	*Equity No. 22,216*
Marvin Mandel, Governor	:	
et al.,	:	
Defendants	:	

Gulf Oil Corporation,	:	
Plaintiff,	:	
v.	:	*Equity No. 22,461*
Marvin Mandel, Governor,	:	
et al.,	:	
Defendant	:	

Phillips Petroleum Company	:	
Plaintiff,	:	

v.	:	*Equity No.*
Marvin Mandel, Governor,	:	*22,502*
et al.,	:	
Defendant	:	

Ashland Oil Co.,	:	
Plaintiff,	:	
v.	:	*Equity No. 22,502*
Marvin Mandel, Governor	:	
Defendants	:	

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[3] Pursuant to notice the deposition of Charles H. King and J. D. Campbell were taken on Thursday, June 19, 1975, commencing at 9:30 o'clock a.m. at the office of the Attorney General of the State of Maryland, 11th Floor, One South Calvert Building, Baltimore, 21202 before James F. O'Brien, Jr., Notary Public.

APPEARANCES:

Louis A. Noonberg, Esquire,
and
David F. Tiefara, Esquire,
On behalf of Exxon Corporation

Wilbur D. Preston, Jr., Esquire
On behalf of Continental Oil

Robert G. Abrams, Esquire,
On behalf of Shell Oil

Lawrence S. Greenwald, Esquire,
and
Nancy E. Paige, Attorney,
On behalf of Gulf Oil

Fred W. Drogula, Esquire,
On behalf of Ashland Oil

John Henry Lewin, Jr., Esquire,
and
Richard Goetsch, Esquire,
On behalf of Petroleum

John A. Woodstock, Esquire,
On behalf of Defendants.

[4] *STIPULATIONS*

It is stipulated and agreed by and between counsel for the respective parties that the reading and signing of these depositions by the witnesses be and the same are hereby waived.

CHARLES H. KING,
and
J. D. CAMPBELL,

being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

MR. WOODSTOCK: This is the deposition of Petroleum Oil Incorporated. They are not a party to this particular suit. At this time, I would like to have Mr. Lewin, counsel for Petroleum Oil, Inc., to introduce the two deponents.

MR. LEWIN: The first is Charles H. King, Vice President Marketing for B.P. Oil Inc. and the second is J. Douglas Campbell, Jr., who is General Manager of Retail Sales for B.P.

It is understood, I believe, Mr. Woodstock, that both deponents have been sworn and will answer questions as you propound them.

[5] MR. WOODSTOCK: Perhaps if we can, pursuant

to the summons, maybe they can just briefly state respectively their general areas of information which they will then field the questions for. We will try to produce less of an overlap for the purpose of expediency.

MR. LEWIN: I think you can do that.

MR. KING: I'm not real certain what he is going to be asking of us. My responsibilities are of a general nature and have been with B.P. during most of – or since May of 1972, in general management, and am prepared to talk to the history of the corporation and its relationship to the current market price situation and Mr. Campbell has been with the operation the last couple of years and has been directly involved in our retail station operation and can probably answer in more detail some of the specific questions than I could.

MR. WOODSTOCK: At the outset, I would like to thank you gentlemen for taking time out. I know you are busy.

MR. LEWIN: I think the record should reflect the depositions are being taken pursuant to provision of a protective order signed by counsel of all parties and the understanding is that the transcript of this deposition, [6] shall be filed in the court under seal and any exhibits which will be introduced during the course of the taking of this deposition will not be subject to public scrutiny until such time as it is ordered by the Circuit Court for Anne Arundel County.

MR. WOODSTOCK: Okay. In fact, the documents we will introduce today will be marked as exhibits and noted in the deposition but will be separately transmitted by the Attorney General's office directly to Judge Childs of the Circuit Court of Anne Arundel County.

I would like to deal with general questions as to when the decision was made by B.P. Oil, Inc. to go to the Gas and Go route.

MR. KING: It's a decision that was made in the Summer of 1973.

EXAMINATION OF MR. KING

BY MR. WOODSTOCK:

Q. Was there any background studies and reports done of the marketing areas that led to this decision? A. Yes. These studies grew out of a task force I had appointed early in the year 1973 and the results of the study were written up and presented to our management committee [7] which is the corporation officers who are on the Board of Directors and then eventually approved by the full Board in June of 1973.

Q. Were there any preliminary investigatory work done in 1972?

I'm not trying to trap or trick you. There is a report of recommendations dated November 1972. Perhaps if I show you the document – A. The study followed an experiment with Gas and Go operations that had been moving forward in Philadelphia in 1972 and perhaps it was a report written up leading up to that project.

Q. Mr. King, I'm giving you a document and perhaps either you or Mr. Campbell can identify the document.

MR. CAMPBELL: This report was a follow-up to a conventional expansion program that recommended that that program be stopped.

Q. Was that conventional program you are referring to – were those studies performed in the 70's or 60's or when? A. Perhaps I ought to go back at this point in time. I know a little history here that I think is appropriate.

[8] Q. I'm going to ask you some general questions about that.

Mr. Campbell, would this document in any way reflect those prior studies on conventional operations of which the 1972 document perhaps would be an expansion of or recommendation pertaining to?

MR. CAMPBELL: Yes. This document recommended as it says, a retail marketing expansion for Washington and there is one for Baltimore, also. It's dated November, 1970.

This report of late 1972 is a follow-up to the 1970 report.

Q. Was the 1970 document performed for B.P. Oil Corporation?

MR. CAMPBELL: Yes.

Q. The 1972 report is a B.P. Oil Corporation document?

MR. CAMPBELL: Yes.

Q. I will ask the court reporter to mark the first document which will be Defendant's document study of the Washington Retail market and recommendation for expansion, market development planning, November 1970. I guess we can call it No. 1. It is 66 pages total.

[9] (Whereupon document referred to above was marked Deposition Exhibit No. 1)

Q. I would also ask that Defendant's Exhibit No. 2 be entered, entitled "Recommendations" dated 11-3-72. It is 26 pages.

(Whereupon, document referred to above was marked Deposition Exhibit No. 2.)

Q. I would also like the record to reflect copies of these documents have already been provided by counsel from B.P. to all counsel for the plaintiffs in this action.

Now, Mr. King, perhaps you can give us some of the history. Primarily, I am interested in knowing what the situation was with B.P. Oil historically, perhaps commencing with the late 1960's, the method of operation being utilized by B.P., how they got there and why, in 1972, they decided to change? A. B.P. is a wholly-owned subsidiary of Standard Oil of Ohio and became part of SOHIO in January 1970. It had previously been Sinclair properties along the East Coast from Maine to Florida

with two refineries and it was involved [10] with a merger with ARCO and then, of course, the Justice Department asked them to separate out that and these assets were acquired by British Petroleum. So, SOHIO and British Petroleum entered into an agreement which merged these properties with SOHIO along with assets of oil on the north slope in exchange for 25% ownership in Standard Oil going to British Petroleum. So that these marketing assets along the East Coast and these two refineries were operated by B.P. since January of 1970 and they have turned out to be extremely unprofitable.

Sinclair Oil operated their operations without paying a heck of a lot of attention to the marketing phases of it and when we got into it we just found that the distribution lines were so thin and the market penetration so little that there was just no way we felt we could continue the operation as it is to make money.

Q. How many years did B.P., after they acquired the Sinclair locations continue to operate in the conventional manner? A. We acquired it in January of 1970 and we operated it until mid-'73 that way and in that period of time we did everything – we had learned how to make the marketing [11] operation and refining operation profitable in our SOHIO experience and during this time we pruned out and divested ourself of our assets in the Carolinas. Then, in New York State, we withdrew from New York City by selling our stations and terminating them because of the lack of possibility there.

In 1973, we sold the assets in Florida and Georgia along with our Texas Refinery to American Petrofina because we had learned by that time that the capital investment to become a viable major marketer wasn't going to give us the kind of return you would expect so we sold off those assets. In the Summer of 1973, we relocated out

of our headquarters in Atlanta up to Wilmington, Delaware and proceeded to try to market profitably from Virginia, north to Maine.

Q. You mentioned the SOHIO experience. Isn't it true that SOHIO has traditionally marketed direct retail in Ohio? A. Yes. And, most of my career has been spent in that organization.

Q. In other words, in 1970, when BP acquired the Sinclair location for the Maryland area, SOHIO Oil in [12] Ohio already had a relatively lengthy history in direct retail? A. Yes.

Q. Why was the decision to maintain the conventional method of operation – if I'm not mistaken, the report of 1970 made the direct recommendation we undertake an expansion program. A. Yes. As part of BP's early association with SOHIO, the study you referred to was made of each of our major markets because we could not spend the kind of dollars necessary throughout the 16 States. We analyzed the market within it to see where the growth potential was, where we had representation, with the idea well, let's concentrate our investment. So, as a result of the studies in 1970, we decided we would buy land and build conventional service stations in Baltimore and Washington, Atlanta and Florida and after doing that, then, thru '71 and '72, as a conventional service station, we had spent upwards of $50 million in land and buildings, conventional two and three-bay service stations. We didn't change our market penetration.

The market that was growing about 4% a year – why we were getting all of our growth strictly through the new [13] stations we would put on and our others weren't going at all. Our ability to get sites zoned, even though we had monies available, was very disappointing, considerably below what we had forecast what we would be able to do.

In an area like Washington, it takes a couple of years to get a site zoned and you have a lot of failures so we never really got the program off the ground and after spending all this money in two years time, we decided that to continue that way – we had to make the decision of either withdrawing completely from these markets, as we had from the Carolinas and Florida and Georgia, or do something significant to improve the profitability.

We lost, in the four years, over $150 million in this business and we just couldn't continue at that rate, hence the decision to stop making investments in conventional service stations and see if there wasn't a viable way of retailing in a profitable manner; hence the study and the task force report leading on the Gas and Go decision.

Q. In those two years, you said you lost $150 million? A. Right.

MR. PRESTON: Four years.

Q. Four years, you lost $150 million.

[14] How did the retail operations stay in business those four years? Where was it financed from? A. It was financed out of corporation funds.

Q. All aspects of the corporate funds? A. Right.

Q. Revenues produced by what aspects would go into that total fund? A. The whole resources of the Standard Oil Company.

Q. Including refining? A. Everything.

Q. Exploration? A. Including coal mines. The whole thing.

Q. During those years of conventional operation, I would like to key in on the Baltimore area.

Was the Baltimore market profitable or non-profitable?

MR. LEWIN: When?

Q. During '70 to '72. A. It was unprofitable. I recognized that it was reported but that was not fully allocated.

In other words, we used functional reports that don't necessarily allocate to a private center. In your example, Baltimore. All the [15] home office management overhead and research expenses – in other words, it's not a financial report in terms of what an annual report for a corporation would be, a balance sheet kind of thing.

It is an internally used thing to compare the retail operations or the entire sales operation in an area with that similar kind of operation in other areas or compare what change has taken place from one year to another with similar assumptions, rather than an end result profit and loss statement like you would have at the end of the year for whole corporations.

Q. Maybe Mr. Campbell can answer this if he is involved with Baltimore, Maryland for the purposes of retail marketing of BP Oil, Incorporated.

During the years 1970-1972, segregated as a whole from the BP operation, was the Baltimore market showing a profit or a loss, the retail operation only?

MR. CAMPBELL: I can't answer your question directly. Let me digress a little bit.

As Mr. King said, the report that you are referring to was a functional report to compare one division to [16] another and to compare particularly those areas of income and expense that were directly controllable by – for instance, the Baltimore Division Manager.

These reports were not financial records and they did not go into complete detail down to what would be considered an absolute bottom line profit or loss number.

EXAMINATION BY MR. WOODSTOCK
OF MR. CAMPBELL:

Q. What factors go into this functional report of the Baltimore Retail Market?

Am I right or wrong in assuming it pertains to the

profit or loss shown at the retail operation being undertaken by the Corporation in a given marketing area? A. Direct, naturally, yes. But specifically, no. In other words – I'm sorry – I can't answer your question directly as I said initially.

I have seen an attempt to fully allocate income and expense for the mid-Atlantic Region which included the Baltimore-Washington Division, Virginia, Maryland, District of Columbia, Delaware and those operations in total were showing a loss during this period of time.

I have not done an analysis of Metropolitan [17] Baltimore specifically, fully allocating every to the nth degree to be able to tell you that it was absolutely profitable.

MR. KING: The numbers we use to determine a BP total possibility in time back to this $150 million loss number I cited is a number that includes the refining piece of it, the marketing piece of it, the distribution piece of the whole ball of wax.

Now, that would have charged against it the allocations for these overheads. When we get down to looking at what has happened in the middle-Atlantic region of which Baltimore Sales Division was apportioned for field management use; we are looking at things over which they don't have control such as the amount of advertising expense that is going on; the charges for credit card operations; the engineering expense; etc.

There are things they don't have any control over so we develop functional profit and loss statements that would include their salesmen's expenses, their maintenance expenses, their distribution expenses concerned with the [18] middle Atlantic region, site costs, etc., a portion of the BP home office allocations costs of running that operation and using those kinds of numbers, Balti-

more was about a breakeven proposition in 1972 and 1971.

EXAMINATION OF MR. KING

BY MR. WOODSTOCK:

Q. In 1972, when the decision was made to convert from conventional to the Gas and Go program –

MR. NOONBERG: I thought the witness said that was 1973 when the decision was made.

MR. LEWIN: The Summer of '73.

Q. All right, '73. What part, if any, did the report and recommendation and study by Mr. C. L. Hickerson play in that decision, the BP Northeast Project Report?

MR. LEWIN: Of May 9, 1973?

MR. WOODSTOCK: Right.

MR. KING: It played a major part in it.

Q. Is that the result of the task force that you spoke of? A. Right.

Q. Approximately how many people were involved in that? [19] Do you have any idea? A. Well, a great many people. There were five, roughly, key personnel.

Q. Key personnel? A. Key personnel.

Q. May I ask you to look at this document and identify it.

Would you read for the purpose of the record, the title of it? A. This document is our BP Northeast Project Report containing the recommendations and summary of this task force which led to the decision to convert some of our marketing operations to gas only retail –

Q. We will have this marked as Defendant's Exhibit 3.

(The document referred to above was marked Defendant's Exhibit No. 3.)

MR. KING: You concentrate on this gas only. The facts are BP is now selling only 10% of its gasoline through these kinds of units. 90% of our billion, three hundred million gallons a year are going through inde-

pendent [20] marketers and the jobbers. So, this project that you are talking about is a drop in the bucket compared to the total.

Q. I appreciate that. Thank you.

* * *

[23] Q. We may have already touched on it but can you tell me what the primary circumstances were that made the conversion to Gas and Go so profitable at that time or estimated profitable in 1973? A. Well, I think our experience in operation of stations in Ohio, our experience in two experiments that were run; one in the Pittsburgh area and another in Philadelphia, and the success that we saw taking place in the independents who were marketing through gasoline only facilities. They all went together to convince us that it was a way that undoubtedly we could sell gasoline, retail gasoline, and do so profitably.

Q. Was the supply situation a factor in this decision? If it was not a factor, was it considered that it would effect this conversion to the Gas and Go type of operation? A. The assumption was made there would be plenty of supply. We were in the process of spending $150 million to expand and modernize our marcus hook refinery and in contemplation of having gasoline available through that means. There wasn't any question in our minds in that period of time that we would be able to supply the gasoline manyfold. Again, I comment that this is still 10% of our business.

MR. LEWIN: Are you referring to retail refined supply or crude supply? A. Refined supply of gasoline.

Q. Would you turn to page 11 of the BP Northeast Project document? Referring to the second full paragraph on that page.

MR. LEWIN: You mean the first full paragraph. The second paragraph or the first full one?

Q. Yes. I will read that entire paragraph and ask you a few questions about it.

(Whereupon, paragraph referred to above was read into the record.)

Apparently in this report the supply situation was a factor and was considered and discussed. My reading of that paragraph indicates that so-called second rate private branders may have a hard time getting supply and this [25] may produce additional business available for integrated suppliers.

First, I would like to ask you who would be considered a second rate private brander? A. I don't know Mr. Hickerson had in mind.

EXAMINATION OF MR. CAMPBELL

BY MR. WOODSTOCK:

Q. Mr. Campbell, do you know? A. Well, he's talking about private branders, gasoline only marketers without a secured supply and a refining capability. The ones he names here are all people with refining capability to the best of my knowledge so I have to assume when he is speaking of second-rate private branders that he is talking about those without their own refining capability.

MR. KING: You have to recognize the time-frame in 1973 and what was going on when this statement was developed. At that point in time BP, where it had – was allocating gasoline in the neighborhood of 70% under a voluntary program to its customers and in order to reach 70% to its regular customers, it cut off a lot of independent [26] marketers who we did not have contracts with and who depended on us for gasoline.

Now, the allocation program under the Federal Energy Act changed all that and required us and everybody to go back and supply all of these people. Subsequent to this statement in this period of time – so, they were getting under this program their fair share of what was available

so that the statement that appears in here is countermanded by the Federal Energy Act.

What the inference here still is it's our experience that major dealers – that dealers of major oil companies, including our own, tend to operate on the philosophy of low volumes, high margins, and the independent marketer tends to operate on the philosophy of low margin, high volume. As long as those two things are at work in the market place, there is room for both of them and there is a change to shift our operation from what was a conventional operation, mostly dealer operated or operating on the philosophy of low volume and high margins, to shift over and do what the independents were doing and make a buck at it and that's what I think we are trying to say.

[27] Q. The last paragraph on page 11 reads: "The point of the aforegoing is not to predict precisely what may happen in the market place in light of the current tight supply, it is to demonstrate while private brand buyers may be in for a rough time in the future, the integrated oil companies who sell via the Gas and Go approach are in no basically different position than other integrated companies and may actually profit from the supply situation."

What is your understanding of what is meant by that? How can an integrating company marketing through Gas and Go actually profit from the tight supply situation?

MR. KING: Well, I think Hickerson is stating there as the supply fails to reach the demand the price is going to go up. And as at this point in time there was a limited supply and the major oil companies were trying to protect their regular customers, the dealers, they would stop supplying where they could, gasoline to the independent buyers and that would – obviously, if the Scott and these small independents – I guess Scott is in that category – their customers would then have to go buy from

other outlets if there wasn't any gas available from these independents. As I said, [28] that didn't happen because the law came and said you can't cut these people off and it is still the law.

Q. Didn't the law also allow that if you opened a new location to supply that location?

MR. KING: If you got Federal Energy approval.

MR. CAMPBELL: I think the thing this particular statement is doing more than anything else is saying there still will be fierce competition in the gasoline only business even if some of the spot market buyer type gasoline only markets have difficulty in obtaining supply. This being true because of our sufficient gasoline only marketers with assured supply that are not going to have a serious problem. That competition is not going to diminish particularly.

EXAMINATION OF MR. KING
BY MR. WOODSTOCK:

Q. Mr. King, you mention margins. Is the margin in the direct company run operations smaller or greater than a conventional operation? A. Come again?

Q. You mentioned margins of profit. A. Right.

[29] Q. I think that's the difference between the cost of the gasoline to the dealer and what he sell it at, is that correct? A. Okay.

Q. And the cost to the company at what they sell it at. A. All right.

Q. Would the margin be higher or lower to BP Oil marketing gasoline and sells directly to the public through a Gas and Go location or through a conventional station?

MR. LEWIN: It's a meaningless question. I don't understand it.

Q. Is there a greater margin when BP sells gasoline – A. I think the margin depends so much on how well you are running your stations and what is going on. I think

our studies have showed our differences are very minimal. The factor is if they are the same, dealer operations per unit may pump – let's say in our terminology at best 25,000 gallons per month per unit, whereas a gasoline only facility – you are talking about 150,000 gallons a month. If you are [30] assuming a four cent gross margin concept you multiply that times the gallons and that is where the success of the Gas and Go operation comes into play. It's not the margin per gallon, it's the number of gallons we are talking about.

Q. Does the Hickerson report project a greater profit margin selling directly as opposed to the conventional operation? A. Yes.

Q. Do you have an idea – can you tell me please, what the difference was? Was it one cent, two cents, per gallon? A. Gee, I don't recall. It was something less than a penny. But, again, as I said, it's the volume multiplier that makes the profit per station the attractive thing in a gasoline only kind of operation.

In other words, if you made a penny gallon on a 30,000 gallon dealer station and you made only half a cent a gallon in a gas only operation but you were pumping five times as many gallons through the gasoline only operation you would be better off going in the gasoline only operation.

Q. Let's move up to the implementation period of the [31] gas and go conversation.

The Hickerson report was filed May 9, 1973. Can you tell me again when the Board of Directors considered it and decided to – A. I recollect it was in June of 1973.

Q. For the purpose of the Baltimore market – you can refer again to the report there, I believe at the beginning of page 14.

They give a current listing of BP stations for the various markets. On page 15 there is a column of listings of

the competitors BP had previously identified as those producers, refineries, with whom they were in competition.

The number, I believe, in the Baltimore column was 27. What was the total number? I'm not sure if it's reflected in it or not.

MR. LEWIN: 27 what?

Q. 27 locations, gas and go. A. What kind of locations, BP Gas and Go's?

Q. Right. Page 14, the top of the page. The proposal was initial Gas and Go's in Baltimore, 19; conversions 8. Rate of new building, two per year. The 19 initial Gas and Go's, were they already company owned and operated? [32] A. No.

Q. Where part of them company owned and operated? A. They weren't even in existence. What we are saying is that we felt in analyzing the properties we owned in Baltimore that roughly these numbers, 27, would be suitable to make into gasoline only facilities.

Q. Bear with me a moment. A. You are referring to page 46.

Q. It was also in the previous report, too.

The appendix, page 46, in the Northeast Project document. The total number of locations identified to be Gas and Go's or potential Gas and Go's was what? Can you tell me? I believe it's 40, is that accurate? A. 27.

MR. CAMPBELL: There are 30-odd here. You have to bear in mind some of these, for instance North and Madison and 25th and Harford are anticipated purchases of new sites where there wasn't a BP station of any kind at the time this report was done.

The 27 referred to properties owned or leased by BP or that would be suitable for gas and go and had [33] a conventional station on it at the time of the report.

That's what the disparity in numbers.

Q. Do you know offhand the total number of BP company owned and operated Gas and Go locations currently operating in the State of Maryland?

MR. CAMPBELL: I think it's about 35. I would have to get a list and give you a specific number.

MR. KING: You have to recognize at this point in time our organization – our sales organization was a Baltimore sales function and a Washington sales function and Washington also has Maryland sites in it. So, we were looking at – you were just talking about Maryland. You have to combine parts of both of those markets.

Q. If you combine both of them, can you give me an estimate of the total number in the State of Maryland?

MR. KING: That was the number Doug gave you.

MR. CAMPBELL: 35, plus or minus two.

Q. On top of that, was that a result of the initial conversion plus the two per year expansion and the estimate of the Washington, D.C. –

MR. CAMPBELL: Yes.

[34] MR. KING: If you look on page 45 which precedes that, you will see a whole list of Washington locations, a great majority of which are Maryland potentials. So, we are looking at that point in time that may be 50 plus possibilities and we are saying that out of that so far we have got 35 of them in operation.

MR. CAMPBELL: Just to put these lists in proper perspective and the report, too, I think this report is a result of a study done by the task force and their best estimate of how to proceed and what sites to use and not to use.

As we implemented Gas and Go, we went back and reassessed everyone of the sites, and some, for one reason or another, have dropped out, and others, for one reason or another, have been added.

This list was not cast in concrete just because it happened to be appended to this report. Naturally, this is the way we want it but not specifically down to the letter of the report in any case.

Q. Perhaps that can be most graphically demonstrated by some of the recommendations as to implementing the [35] conversion and BP's dealing with the existing dealers at those site locations.

MR. KING: Right.

MR. CAMPBELL: We were simply told we were not going to do that.

Q. What did you decide to do with the existing dealers?

MR. KING: We decided – did you get our September letter?

MR. WOODSTOCK: I have it. I would like for you to tell me.

MR. KING: We decided to offer dealers who were in stations that we didn't plan to convert to gas only operation several alternatives. One is to become – we are talking now about all dealers. Some of them were in sites that we had intended to make gasoline only facilities and those dealers could become the manager of that station.

(Discussion off the record.)

EXAMINATION OF MR. KING

BY MR. WOODSTOCK:

Q. Mr. King, I believe when I interrupted you, you [36] were telling me what BP policy decision was with regard to existing dealers at locations where there was going to be a conversion. A. Another alternate we had available was they could buy or lease the facility they were in if it happened to be one, as most of them were, that we were not going to convert to Gas and Go. Or, if we had another location available, they could transfer or move over to that station and we would pay whatever relocation expenses were involved.

Q. Would the man realisticaly have the opportunity – this is hypothetical. I don't know if it existed. I have reason to believe in some situations it did. If the man was a dealer at a location doing maybe 60,000 or 80,000 gallons a month, would he be able to move to a new location with that type of gallonage history or would, under the key locations BP had in the Baltimore Metropolitan market, would they have been eliminated because of the gas and go program would have preempted those locations? A. I think in looking at that question, the answer factually, in another situation we determined there were roughly about 35 facilities that were available to these displaced dealers. That were, in our estimation, first-class [37] locations. The point being the inference has been made, gee, we were selecting for Gas and Go use all of the key sites where there was high-volume potential and that there was nothing left for the dealers we displaced from these locations but the dogs. That's not true. Gasoline only facilities are keyed to high traffic volume locations. We had purchased in the last couple of years, prior to this time, a good many sites in Vienna, Virginia or in Springfield, in Gaithersburg, Maryland, places with neighborhood kinds of stations, that there would be a lot of inside work as well as substantial volumes in the numbers you are talking about.

A good site, for instance, is the Columbia, Maryland station we had which was pumping high volumes. It was not a gas and go location. These kinds of locations were offered and made available to dealers.

Q. Do you have any idea how many opted for that option?

MR. CAMPBELL: I can't give you a number.

EXAMINATION OF MR. CAMPBELL

BY MR. WOODSTOCK:

[38] Q. Can you give me a percentage estimate? A. I have to look at the list. The only one I can think of

readily is a situation in Laurel where the man moved from a station we wanted for Gas and Go to a brand-new conventional station that we had just purchased the site for and constructed the station and it was a good conventional location, I like to believe, or we wouldn't have purchased it. But, it did not fit the mold for Gas and Go and he opted for that. There are other similar examples. I can't give you a number right off hand.

The thing is, the dealers in the Gas and Go sites were offered the alternative of becoming what we call an I-manager or an incentive manager of a gasoline only facility when it was constructed and in those instances, and I think there were like seven or eight that are still now with us as Gas and Go I Managers in Maryland; we bought their inventory and equipment and disposed of it ourselves so they would suffer no loss on getting rid of their assets.

These guys are quite happy and they are doing a good job for us and I think this has worked out. Other people moved to competitive locations that were available and [39] in those cases we would pay them a relocation allowance. Some people got out of the service station business entirely. In those cases, we purchased their inventory and equipment.

I can't think of any example right offhand where one of these dealers bought outright another conventional station from us. Compared to examples elsewhere, where that has happened, and generally, these alternatives have proven to be viable alternatives. That is, dealers that were in locations where we wanted to replace conventional operation with a gasoline only operation, the dealers in locations that were not identified for Gas and Go were given new leases. And, in those cases, there have been some that have purchased the facility and we have continued to supply them. We didn't take any action to get these people out of their conventional stations.

Q. Did you accomplish the goals set forth in the Hickerson report for the total number of conversions and Gas & Go units? A. Slowly but surely we are getting there.

Q. Are you sure you didn't hit it right on the head by 1974?

[40] MR. KING: These days, we are not sure of anything.

(Discussion off the record.)

Q. On page 14 of the BP Northeast Project Report it suggested or recommended projections for initial gas and go was 19 with 8 conversions, the rate of new building, two per year.

Maybe I am wrong the way I interpreted these figures. 19 means right off the bat open up Gas and Go's, is that correct? A. No. That means to tear down the conventional facility and build a new Gas and Go facility.

Q. Those could be existing dealer locations? A. Yes, it could be.

Q. The 8 conversions? A. That means that the existing facility was not removed, just altered for use, to put it out of the service business and make it a gasoline only outlet without razing the existing facility and rebuilding a new facility.

Q. Were the 19 initial Gas and Go's and the 8 conversions taking place simultaneously? A. Yes.

Q. You had a total of 27? [41] A. Yes.

Q. The rate of new building at 2 per year. Was that the first two per year to be built the same as the initial year of implementation? A. No. The two per year is anticipation of acquisition of additional property. It made the assumption that we would be able to buy two sites suitable for Gas and Go each year throughout the period covered by the project report.

Q. Those would be absolutely new locations without any existing facilities? A. They may be a competitive station that we buy or a vacant piece of land. It's talking

about going out and buying something that we didn't own before.

Q. Okay, so then the project was implemented in 1973. With the projected number of 27 locations, by 1974, it would have been 29.

MR. LEWIN: For Baltimore?

Q. Right. Do you have any idea how many we have in Baltimore right now? A. As I said, it is I think 30 or 35 right now.

[42] MR. KING: You have to recognize again that Baltimore, Maryland, as you are talking about it, encompases what this report calls Washington and Baltimore.

You are putting these numbers together and that is totally meaningless.

Q. Would you define the Baltimore market for me, Mr. King.

MR. KING: What we now consider the Baltimore market?

Q. What you considered it in 1973 and 1974.

MR. KING: The Baltimore market is shown on page 4 of that report as a map.

(Discussion off the record.)

Q. Mr. Campbell, I am handing you a document. A. This one?

Q. Would you read the title on the document? A. BP Gas and Go stations as of 8-31-74.

Q. I believe we have already established that we can't establish the source of that document.

Do you have any belief – A. I am pretty sure it was prepared by our District office here.

[43] Q. Would you look at the listing under the Baltimore Gas and Go's? A. Yes.

Q. Is the information reflected on the document accurate, to your knowledge? A. Yes.

Q. Including that on the second page? A. To the best of my knowledge, yes. I'm not exactly sure when each

and every one of these stations began operation as a Gas and Go but I assume this is correct.

Q. I ask that this document be marked as No. 4.

(The above referred to document was marked Defendants' Exhibit No. 4.)

Q. Defendants' Exhibit 4 is two pages entitled BP Gas and Go stations as of 8-31-74.

It is a listing for Washington D.C. and there is a listing for Baltimore, Maryland.

If you like, maybe you can verify it. I count that there are 24 operational Gas and Go's in Baltimore.

MR. KING: On August of 1974?

[44] Q. 1974. A. I count 28.

Q. There is an additional 8 stations listed. A. Right.

Q. What does that represent? A. They are conventional company-operated stations.

Q. Are they potential Gas and Go sites? A. Not all of them.

Q. How many of them would be? A. All but one. You're talking of Baltimore ones. Let me look at the Washington ones, too.

Q. No. I'm just interested in Baltimore right now. A. Okay.

Q. From the projected implementation period from 1973 to 1974, numerically, you have just about reached your goal, is that correct? A. Yes.

Q. How many dealer-leases, supply agreements, etc., have been terminated by BP during the implementation period? To date?

MR. LEWIN: What period are you talking about?

[45] Q. From 1973 until now.

MR. LEWIN: You mean the Fall of 1973 until today?

Q. The implementation of the Gas and Go commenced in June of 1973.

MR. KING: It followed our September announcement letter of 1973.

Q. Can you give me the total number? A. One.

Q. The total of all cancellations in any way, shape or form? Do you have any idea? A. You mean mutual terminations and everything combined?

Q. Yes. A. I can't give you a number off the top of my head. Understand, John, I'm not hedging on you. My responsibility is the East Coast, not Baltimore.

I have a hard time talking specifically down to the nth degree on just Baltimore.

(Discussion off the record.)

Q. On page 14 of the BP Northeast Project – A. Yes.

Q. The second paragraph, verbal. What we propose is [46] retaining 76 of the owned stations and 44 of the leased ones. With the existing operations, by itself, it is a relatively meaningless indicator of the total volume or profit potential as part of the implementation to Gas and Go.

Am I right in assuming that one of the factors in that program would be the divesting of BP by various locations that were retail service station sites? A. Yes.

MR. LEWIN: Will you repeat the question?

(Whereupon, question referred to above was read back by reporter.)

A. If I may just elaborate on that a little bit. We have divested a number of properties, just not one being occupied by a service station. Some vacant sites throughout the period since SOHIO acquired BP Oil Corporation, to try to reshape this marketing operation into a profitable entity.

MR. KING: As I recall, there are upwards of 200 stations in Maryland that we have divested and sold to jobbers that are continuing to operate probably as service stations, only the jobbers own them or have assumed our lease on them and this kind of thing. [47]

So, the area we are talking about is in that as defined by the map is where we intend to build our gasoline only facilities.

There is a Delmarva Peninsula part of Maryland. There is the Cumberland part of Maryland where we had dealer operated and perhaps company operated service stations as well as jobber operated service stations that were going to be and are now jobbers.

Those company operated stations and company owned stations we had in that part of Maryland, we have sold to jobbers. What they have done with them, I don't know, but they paid us money for them. So, I assume they are continuing to operate them with their own dealers in them.

Q. Getting back to page 14 of the BP Northeast Project document. Are the numbers reflected there the total 203 for Baltimore – okay, are they service stations? A. Yes.

Q. Can you tell me as of this date how many of those locations have been successfully divested by BP? A. Not specific, no.

Q. 50%, 75%? A. I don't think it's that high.

[48] Q. The projection is to divest yourself of all of them, correct?

MR. KING: How many dealers do we now have in Maryland, roughly? 150? A. Yeah, about.

MR. KING: The BP Oil Company has approximately 150 dealer-stations in the State of Maryland. In addition, there are hosts of other dealer-operated stations that our jobbers have in the State of Maryland.

Q. Would you tell me what the document generally reflects? Can you identify that document or the information contained thereon? A. This is a recap of dealer terminations from the period January 1, 1973 to December 31, 1974.

Q. Would you read off the figures that appear on the recap sheet? A. Dealer leases mutual cancellation fee and third-party; dealer initiated 53, company initiated, 24,

Dealer leases expiration of underlying lease total expired 31, other cancellations 7.

Supply agreements terminated, 31. Total 146.

Q. Now, if you can, can you take each category and [49] tell me what that means to you, mutual cancellation, dealer initiated? What that means? A. That means that BP and the dealer mutually agreed to – well, the dealer decided that he wanted out of the station and we agreed to it.

Q. The second category is – A. Is company initiated. This is where we sought possession of the station and the dealer agreed.

Q. The next category? A. Dealer leases expiration of underlying lease. This is where we leased the land or the building, service station facility or the site it sits on, and we lost our lease with the owner of that property.

Q. The next category? A. Other cancellations. There are a list of seven here, detailed individually, why each of these seven people left BP.

Q. I would like to have this document identified and marked as Defendant's Exhibit 5.

(Whereupon, the foregoing document was marked Defendant's Exhibit 5.

[50] Q. As reflected in this document from January 1, 1973 to December 31, 1974; it was a total of 146 dealer leases mutual cancellation fee and third-party concluded. A. 115. 31 are supply agreements. Remember, we are mixing apples and oranges here a little bit because we are talking about some Gas and Go locations in there and some non –

Q. Let me ask about supply agreements terminated. Generally, what type of supply agreement would that be, and with whom? A. That would be an agreement whereby we supplied someone who owns his own outlet, be it a service station or a grocery store or a garage.

Q. Would he be marketing under the BP Brand name? A. Sometimes.

Q. Other times? A. Well, many times these little garages don't even have signs.

Q. Would any of these supply agreements perhaps be with people who would buy from BP and then market perhaps under their own brand name? A. I can't think of any offhand, but it's possible.

[51] Q. 1973 to 1974, we terminated 117. Is that what you said? A. 146, less 31.

Q. 115 were accomplished. Did any of these result in lawsuits? A. Yes.

Q. Do you know how many? A. On the last page of the attachment there, it shows the status as of the time that piece of paper was prepared.

MR. LEWIN: There are actually a couple more. There's Mr. Monroe. He brought a lawsuit. Mr. Jones brought a lawsuit. They have all been dismissed.

Q. A total of about five or six lawsuits, then? A. Yeah.

Q. Do you have any idea what has happened to those site locations? A. Which site locations?

Q. Where the underlying lease dealer initiated mutual terminations, mutual cancellations. Those 53 locations that were dealer initiated. Has BP divested themselves of those locations or retained ownership and converted any [52] of those locations? A. I can't tell you in general terms. I'd have to go through them individually. Some became Gas and Go and some have been divested.

I just can't tell you specifics. That's a very broad question.

(Discussion off the record.)

Q. Mr. Campbell, I'm giving you a document and I ask if you can tell me if the information reflected on there is an accurate representation of Gas and Go locations that resulted from mutual cancellations.

A. Yes, it is; with one qualification. There are a couple of these locations that the dealer listed on this piece of paper left before Gas and Go was in the picture.

Q. Can you identify those.

A. Yes. I may miss one or two. 29th and Greenmount. I don't know why that guy left or where he went. Falls and 36th. I think he left before the Gas and Go program and went to a competitive station.

Those are two that come to me off the top of my head.

6900 F Street. That had little to do with Gas [53] and Go.

Q. Would you give me the total number of Gas and Go locations on those sheets?

A. 14.

Q. So, with the exception of 3; 11 Gas and Go locations resulted from mutual termination or mutual cancellation at those locations, is that correct?

A. Yes. But keep the numbers straight. The last three on this list are in Washington.

Q. They are in the State of Maryland.

A. Yes.

Q. So 11 are in the State of Maryland.

A. No. Those three are in the State of Maryland, but they would be part of the numbers in the report under Washington.

Q. In setting up Gas and Go stations how is the retail price established at those stations?

A. On the basis of competitive resale prices in the trading area of the station on an individual station basis.

Q. Then each station price would be set independently and can very well be different?

[54] A. That's correct.

Q. What was the estimate of the relative profitability

from the Gas and Go stations at this point of operation as opposed to the conventional?

A. The Gas and Go stations were expected to be more profitable.

Q. For what reasons?

MR. KING: Because we had more volume and less expenses.

Q. What was the projected volume for those locations?

MR. KING: Approximately 150 but it would vary one to another.

Q. Was BP under an allocation program at that time in June of 1973?

A. Yes.

Q. Was that voluntary?

A. Yes.

Q. When did the mandatory controls come in?

A. My recollection is January of 1974 or November of 1973. I forget. Somewhere in there.

Q. Under those allocation formulas, how is the base [55] period for each location established?

A. In conformance with what that station was pumping in that same month of 1972.

Q. Were there exceptions to that rule?

A. I don't follow you.

Q. Was there a procedure under the FEA Statutes and administration in which an oil company could request an exception or a change for that base period?

A. Yes.

Q. Was that at the inception of the mandatory controls or did it come about later?

A. My recollection is it came about later.

MR. DROGULA: March of 1974.

Q. Mr. Campbell –

MR. KING: John, the facts are, as I recall them that we went to the FEA in February of 1974, explaining

our program and trying to get their concurrence with what we were doing. Namely, converting to Gas and Go and setting up what our relationship was with dealers. Subsequently, in conformance with regulations, in May, we supplied them with a bunch of their forms called FEO 17-S [56] specifically requesting allocations for gas only facilities which were different than the base volumes they would have pumped had they been open in 1972.

Q. Did BP file many such requests for changes in their base period under the FEO 17 form and FEA procedure?

MR. KING: We were required to file one for every Gas and Go station we had.

Q. Were such requests made for every Gas and Go location?

MR. KING: Yes.

Q. The effect of such requests was to increase gallonage at that particular location which would have been prohibited if we had to use the 1972 base figure?

MR. LEWIN: Do you mean is that what they requested, an increase, not effective?

MR. KING: We asked for a base period volume commensurate with what our projections were with what we could pump at those stations.

Q. Do either of you have any knowledge, approximately, what percentage of such requests were granted by FEA?

[57] MR. KING: At this point in time, almost all of them have been granted. I have to qualify that in terms of in November of 1974 the FEA gave us allocations in the amounts we requested for a 60-day period. In January of 1975, they gave us five month allocations for these same stations. Last month these came to a termination and they gave us a permanent allocation for these stations.

Q. I believe it's true and if it's not, please correct me. The Hickerson report seemed to indicate the average BP conventional location was pumping around 32,000 gallons per month for Baltimore or 33.

A. Was it that high?

Q. Is it higher or lower?

A. I recall the overall number was about 20,000 gallons a month. I don't recall specifically the Baltimore number.

Q. Well, Mr. Campbell, just from your own knowledge, can you give me in round figures what the average would have been for the Baltimore-Washington D.C. markets for the BP conventional stations in 1972?

A. I would guess in the high 20's and low 30's.

Q. What were the latest requests, average or general [58] requests, in gallonage for all of the gas and go locations that are now currently in operation and for which you just recently received those permanent allocations?

A. Around 120,000 gallons a month.

Q. Per unit?

MR. KING: No, sir.

(Discussion off the record.)

Q. What was the general amount of gallonage requested for each gas and go location by BP of the FEA for a monthly allocation?

A. Aproximately 120,000 gallons.

Q. Can you tell me what FEA eventually granted you as an allocation, a general figure?

A. About 65% of that.

Q. Which would total about 80-some thousand?

A. Yes, 75 to 80 thousand.

Q. During the period of the shortage, were any of these requests of FEA for increased allocations for stations in the Baltimore Metropolitan area or the

Washington D.C. suburban Maryland counties, were they granted?

MR. LEWIN: Can you be more specific in terms of the period you are talking about?

[59] Q. The severe shortage period.

MR. LEWIN: Are you talking about January, February, March of 1974?

Q. Yes.

MR. KING: What is your question?

Q. Either Gas and Go's or company operated, even if it was in conventional manner.

A. Yes. There were some approved during that. They were submitted in April and they were approved two or three months thereafter.

Q. Was there any reaction by the remaining conventional BP dealers of the dealers that it switched to the William Penn brand name to the increased allocation to the company operated stations?

MR. KING: I am confused on the time frame here because in January of 1974 there wasn't even this procedure. The law was just coming into effect and we weren't in it, at that time, for allocations by stations.

MR. CAMPBELL: We submitted applications on some company operated conventional stations and some Philadelphia Gas & Go stations in April of 1974 and that was the first [60] submittal to FEA by BP.

(Discussion off the record.)

Q. I would like to just get back to pricing at the Gas and Go locations. I believe your previous testimony was each location would be determined independently based on the competition within that area. Is that correct?

A. Yes.

Q. In working under the Gas & Go direction operation concept, does that give you a cost advantage in meeting that competition by setting your price for that respective trade area which was greater than it was

under the traditional conventional marketing concept where you gave dealer aid?

A. Will you do that again? I'm sorry.

Q. In shifting to the Gas and Go approach and in setting the price to a given location to meet competition in that trading area; is there a cost advantage to BP in meeting that competition through setting their own prices in a Gas and Go as opposed to having a conventional station which BP is giving dealer-aid to?

A. Let's separate that into two pieces. Let's talk [61] about a cost advantage on the one hand and pricing on the other hand. On a per gallon basis, if we run these Gas and Go's right, it costs us less to run them than it costs us to run a conventional station on the same site.

I don't know what you mean by cost advantages as it relates to price.

MR. KING: Or dealer pricing over which we have no control.

Q. But under the traditional conventional station operation, how did you meet a price reduction by a competitor in that trading area?

A. In a conventional operation, we are selling product to the dealer. He determines his own retail price. If in a given trade area we decide to lower our selling price to all the dealers in that area, it's up to them what retail price they post.

With the company operation we establish the retail price and I don't see the connection.

* * *

[62] Q. In setting your price in Gas and Go trading areas, [63] where you have Gas and Go location, what factors, other than the general factors of the price of your immediate competitor would you consider in setting that price and arriving at that retail figure.

What I'm asking for is would it be three cents under or three cents lower than independent major –

MR. KING: There is no – in establishing the price of Gas and Go's, we take in many factors. One, and primarily, is what our competitors are doing out there and secondly, is how much gasoline do we have available. Because, under the allocation system, it is limited. So that oftentime you have to consider how much volume you have available for sale at that station in a month's period of time.

Thirdly –

EXAMINATION OF MR. KING

BY MR. WOODSTOCK:

Q. Was there a projected spread between the pricing at the Gas and Go than the major distributors of gasoline at their retail stations?

MR. NOONBERG: I would like to see him answer the question about the factors.

[64] Q. Go ahead. I'm sorry.

A. Another factor to be considered is the cost of the product and the cost of our operation. It doesn't pay to price the product at a cost less than maybe what you are selling than it costs you to produce it.

In these days, in our company, we have probably the highest cost pass through over the base period and that has an extremely important impact on our pricing philosophy. So, in addition to the cost of our operation as a Gas and Go, one of the reasons that any one marketing through gasoline only retail outlets can price lower than the conventional service stations is the economy in operations.

In our case, for instance, we have no advertising. We do not now have credit cards, branded credit cards. We do not accept credit at gas and go stations.

We man it so our gallons per man hour are extremely high and thereby reducing our cost of operation to a

minimum. And those savings are passed onto the customer in terms of a lower price.

Q. How much lower?

A. This will vary by whatever the specifications are at the time.

[65] I think generally in an average overall situation we are talking about in the two and three cent range.

Q. Between whom?

A. That depends on a set of specific stations. It might be that we are equalling people in the market, not trying to be below them and again we are not trying to be the lowest price in the market place or the trading area. The objective would be to move the volume at its highest margin of profit as you can, not just to try to be the lowest and move the most volume out of it.

Q. Didn't you say the greater the volume, the greater the profit? Am I right or wrong in assuming –

A. It depends on what your price is.

Q. One of the objectives of the Gas and Go is to have an efficient operation selling a maximum amount of gasoline?

A. Yes.

Q. Would not a lower posted price than the posted price of the majors competing in a trading area increase your volume?

A. Generally if price were the only factor that was [66] important, but there is a lot of other factors that influence the customer's desire to buy from you than what the price is.

Q. Am I right or wrong in stating that the Hickerson report said for the Baltimore market price consciousness was at a very high level and there was no indication that would change.

A. That's true.

Q. That is the percentage of the market that you are seeking to get into was the private brand market.

A. The price conscious customer was the one that we were trying to appeal to. The customer who was seeking the lowest price, or what he thought was the lowest price in the market place. That's right.

Q. That's what you are trying to capture, that customer trade you were trying to capture.

A. That customer, to a point – there's no sense in trying to capture that customer if in so doing you have to have a price that is so low that you can't make any money.

It's not just volume that we are looking at, it's profit that we are looking at.

[67] Q. Again, at the outset of the implementation of Gas and Go, in what range would the Gas and Go locations be pricing in comparison to the branded majors of the market?

A. Our economics as the Northeast report shows, are based on a retail price somewhere in the two to three cent per gallon less than the projected major in price.

That's the general average kind of concept. But, in the real world, what a competitive major may be charging may be totally different than what the economics and the general approach was.

Q. I'm not sure that you answered my question.

A. Then restate it.

Q. Am I correct in saying that your answer was that the –

A. What is your question?

Q. The idea was that in initiating a Gas and Go location, the idea was to price several cents below the posted major pricing in a given trading area.

A. The idea is to pass onto the customer the advantages you receive from lowered expenses in terms of a lowered price. And, we estimated that our savings

would enable us [68] to save that customer in the two to three cent a gallon number, overall.

Now, to take the stations at X and Y Street and there may be a Saveway across the street and there may be an Exxon on the other corner, and their pricing is such that you are just glad to meet that price and you can't achieve a two cent lower price or match them on the head because to do so would be unprofitable.

Q. If you went into a trading area where perhaps 20 stations, all branded majors, and the average retail pump price for regular was .539, if you went into operations, how would you set the price at that location?

A. We would probably go in and again, you have to look at the time frame because the cost –

Q. I'm asking a very simple question.

A. You think it's pretty simple. You don't know the business. Because if you are talking about .539 in June of 1974, it's a different figure than .539 in May of 1974 because the price of gasoline has changed. So, for you to make a statement like that, you don't know the facts.

Q. The statement in here that the goal was to price two to three cents – is that difference between them and [69] the majors out of the window?

A. Right. In today's market, what this report was talking about was a placid conventional kind of situation. What is out there today because of the price controls is totally irrelevant to the assumptions and the facts that were in that report.

Q. Under today's conditions, could the Gas and Go's operate just as well under independent dealers?

A. Will you repeat that?

Q. Under the facts in the market conditions today could a Gas and Go location work just as well, just as

profitably, perhaps, utilizing independent dealers to pump the gas at that location?

A. We don't think so because we think that having control of the hours of operation, having control of the pricing at that station, having control of the service that is given because it is company operated, will enable us to maximize the volume at a given location versus turning it over to a dealer who is free to do these functions like the hours he operates or the days he operates or the prices he charges on his own.

[70] We do have three dealer operated Gas and Go's in Baltimore – in Washington – so we are doing it.

Q. How are they doing? Does Mr. Campbell know?

MR. CAMPBELL: So far, so good. But it's too early to tell. If I may add my nickels worth here. The key to success for the gasoline only operation, as I can conceive it, keep in mind we are still pretty new to this business and we are still learning, is a balance between price or realization volume and what it costs you to run the operation.

It's how those pieces fit together that determine how much money you are going to make and the volume at which you should be operating that particular station, the price you should be operating at, and how you should be manning that station.

Your example of 20 stations in a trade area are up and down a street, I think is a very realistic situation, but 19 of those 20 gasoline outlets may be grocery stores and garages where gasoline is a secondary business. There may be one gasoline outlet in that particular area that you consider a competitor because as you gain experience, [71] at least so far this is my belief, you find out that some other gasoline outlets within the general vicinity of your outlet are going to have a greater impact with their price with respect to yours than are others. So, when you talk about an

average price in a trading area, it just doesn't work that way. You cannot work with averages.

EXAMINATION OF MR. CAMPBELL

BY MR. WOODSTOCK:

Q. Has BP performed price surveys of the Gas and Go locations in their immediate trading areas?

A. Yes.

Q. As a result of those pricing surveys, were the Gas and Go locations priced lower, higher, or even with a branded major?

A. Typically, lower.

Q. By approximately how much?

A. That varies all over the map.

Q. Between what variables?

A. One and three cents.

Q. How about with the unbranded independents?

A. Anywhere from equal to them to in some cases two or three cents above them and in some cases maybe one or two cents below them. It depends on the specific [72] circumstances.

Q. How about with Crown, Hess, Kayo?

A. It varies all over the map. It really does, from location to location.

At some locations, a particular Crown or Hess or Saveway Station may have a dramatic impact on your volume, depending on his price. Or, if you have all three in a trade area, one of them may be the guy whose price with respect to yours has the greatest impact on your volume. So, you pay attention to him and relatively discount the others.

MR. KING: You may have a situation where you have a Crown that is posting .529 and an Exxon that is posting .519 and you may find that the Exxon has the greatest impact on your volume. So, you will match his price to try to equalize it versus the statement that well, we are going to be at the Crown price or we are

going to be two cents below the Exxon, the major price.

So, to generalize, again, it goes back to Doug's comment that you have to take into consideration a host of factors, at least three, other than what your competitors [73] are pricing.

You have to look at again, how much volume you have because there's no sense just to say we said this station is going to pump 150,000 gallons and cut some low price out there and sell your gasoline in three days. That's kind of wrong.

Q. Was there any anticipated reaction by the other majors to the implementation by BP of the Gas and Go operations?

MR. KING: Yes. We were concerned at the time we were making the project that we might cause them to respond to our pricing practices in such a way that it would be harmful to the market place. But, as a matter of fact, things changed so completely and that has not happened.

Q. The documents that have been introduced there are several references to the Baltimore market being a volatile market. Can you explain that?

MR. LEWIN: Why don't you ask him if he agrees with it, first?

MR. KING: No, I don't agree with that. To me, we have a great many more markets that are more volatile, if my definition of volatile as really extremely price competitive and as a result the average retail price is lower. A market like that is Philadelphia where generally gasoline [74] is a couple cents below the average price in Baltimore, for instance.

Q. The Baltimore market, itself. Would you say it's been a stable market since BP has been operating under the BP Gas and Go in Maryland?

MR. KING: That's a relative term and I would say compared to Philadelphia it has been a stable market. Compared to Washington it has not been a stable market.

Q. What type of reaction was being anticipated?

MR. KING: The writer of the report, Hickerson, had a belief of his own that by our going in with a sizeable number of Gas and Go's, we might upset our competition by pricing two and three cents less than them so they would get real concern and they would be dropping their price. Then, you would have this price war situation that had existed earlier. But, a lot of things transpired and that never happened. I did not happen to believe that. To me, the number of stations that we sought to open in any one market were so small that we weren't going to be a factor and we weren't going to be pricing any different than other independents that were already in the market. So, I just never [75] bought his concern.

MR. CAMPBELL: With the absence of advertising, we don't take any credit cards whatever at the Gas and Go's and the economies in the operation of that station. In other words, the manpower cost, particularly.

We can reduce the amount of money per gallon it costs to run a Gas and Go by two or three cents below what it costs to run a conventional station. Therefore, you can afford to sell gasoline cheaper. That's the essence of the question.

* * *

[76] MR. LEWIN: Margin between what and what?

[77] Q. Profit margin and the cost of product and the ultimate sale to the consumer.

MR. LEWIN: You are talking about BP gross margin per gallon of gasoline?

A. Between our cost of goods? I would say that –

Q. By comparison. Try to compare it to what it looked like with the conventional service station operation, the return on the sale of a gallon of gasoline as compared to a direct operation.

Q. Let me put it this way, John. To date – remember, we have been operating Gas and Go's in Baltimore since late May of last year only. Today, it appears that our margin and our expenses are finally well in line with the projections in the BP Northeast report.

Now, keep in mind that during this whole period of time we are under price controls, tremendous increased crude costs and a number of elements that were not present at the time these projections were made.

It really is way too early for me to say that all of Lee Hickerson's dreams are coming true categorically. [78] From the results to date, we think we are on target and generally those projects are in line with our actual results.

Q. I think this is a correct assumption. As part of the pricing policy for the gas and go's, one of the considerations that would be involved would be to try to promote stability in that market place. Is that correct?

A. I think our objective again is to balance price against volume against the cost of operation. Okay? I don't know what you mean in the first place by promote stability.

Q. You would not like to see a reaction to the price that you have set by the majors or the private branders leading to a price-cutting situation that may evolve into a price war?

Is that a valid factor and is that a consideration?

MR. KING: We talked about that earlier when we said that in a price reacting market you end up having

to either support your dealers by lowering your price to them and therefore losing – like the $213, or if you have a Company operation, you realize less margin. So, I think the ideal situation would be to have a stable market, in your [79] terminology.

Q. In a stable market comprised of an homogeneous group of competing dealers, primarily majors and independent majors such as Crown, Hess, BP, would your pricing policies be in such a market to not undercut all that competition because of the fear of a response?

A. The facts are still whether it's us or somebody else that is running a gasoline only facility. If they run it right, they can afford to sell gasoline more cheaper than a guy trying to provide service and a diverse line of products to the consumer. That's just the way it works if you do it right. Consequently, the whole appeal of gas and go to the public is, that that price saving is passed on to them, otherwise, they have no reason to buy from you. And I don't think you can compare a gas and go to a conventional operation because personally, I don't know what motivation a person would have to buy from a gas and go if forever more it was the same price as the conventional station.

MR. KING: You recall the report stated in it that Hickerson felt we were really competing with the Crowns and Hess and Saveways. We didn't say we were competing [80] with the majors.

We are, in the broad sense of the term, because every driver of a car is a potential customer.

We thought originally that our main thrust would be to price with these other individuals that we have cited, the Hess, and the Crowns and so forth, but what happens in the market place is some of these major dealers might decide, gee, I see Crown and Hess taking

my volume away, I'm going to lower my price to protect that. So, you can't ignore the majors in the market place.

Q. What would BP's response be at a gas and go station if their primary competitors, Hess and Crown, dropped their posted prices two cents?

MR. KING: We would first see what its effect is on our volume. If we didn't see our volume changing, we would probably leave our price where it was.

Q. Assuming it reduced your volume.

MR. KING: Then we would probably decide that we would have to decide whether we would drop one cent or drop two cents.

Q. If you could, would you categorize the pricing [81] policy to the Gas and Go stations as aggressive, non-aggressive –

MR. KING: In relation to what?

Q. Gasoline pricing and the overall market place.

MR. KING: If your definition of aggressive is a price two to three cents less than a normal major brand marketer, yes, that's aggressive. But, I don't think that's aggressive as what's going on out there. That is passing onto the customer the savings you are getting from running that kind of operation. I think that's the whole concept that you have to get across here.

We are just not out there pricing along with the Crowns and Hess at two and three cents less than the majors because we want to get all the gasoline. We are saying we have a kind of operation that has some economics in it that we are trying to pass onto the customer. I think that's the name of the game.

Q. Was the conversion to Gas and Go projected to produce total sales of more gallons of gasoline or less?

A. Than what?

Q. Than was previously sold through the conventional [82] operations.

MR. LEWIN: You mean company-wise?

Q. Yes.

A. Eventually, yes, but more.

Q. Initially?

A. I don't know. Let's look at the numbers.

MR. KING: I think the facts are John – I don't know whether it's in that report. Philadelphia, where we first started this program. We ended up selling more gallons in a period of time through 19 or 17 Gas and Go's than we were through 60 dealer, say, or some number like that. But again, volume is -- again, we're not just out there to sell volume. We are out to make a profit.

A. Our overall situation was one of having a relatively small number of quality sites and the concessional advantage of gasoline only marketing is that each station operates on its own. It doesn't take a massive overlay of advertising and promotion and other kinds of support.

I think that all relates to conventional outlets, to make a Gas and Go station successful. That is why they are looked at as a single entity with volume projections for each rather than under the shared market concept that [83] you have heard about in this industry for years.

Q. As part of the conversion program, it was stated in the report that certain locations we should keep and we should not divest and that we should not make Gas and Go. It was suggested in there that they were fairly good locations we could get dealers for. Then, in two years or so we will decide what to do with them. Was that done?

I noticed on the sheet of stations there were approximately eight or so in Maryland that were held onto.

A. Let me look at the list and speak to the point.

Are you talking about that list on page 45 for Washington, four locations on it?

Q. You have Washington, Monroe, Pulaski and Haven.

A. Again, this report said what we – this task force. What you think you should do with these individual stations. Once the report was finalized, we went back to all these locations and reassessed their potential and decided whether we should go Gas and Go.

Now, looking down this list, Washington and Monroe, Pulaski and Haven, 29th and Greenmount, were all made part [84] of the initial group of Gas and Go stations.

Patapsco and Ninth is a conventional station and as far as we are concerned will stay a conventional station. West Lafayette – I'm not familiar with that. A couple of these I just don't know. But, the same approach was applied to these stations as was applied to the list of the initial Gas and Go's, to rethink as we gain experience, how we should proceed. And, the directions given here is don't just forget about those stations, think about these as potential Gas and Go's. I don't know whether that answers your question or not.

Q. On the 36 page recommendation of 1972, I think the concern was to retain local zoning use permits.

MR. LEWIN: 17 and 18?

Q. 11-3-73.

MR. LEWIN: Number 2.

Q. Are you with me?

A. Yes.

Q. Beginning at the portion of page 17 where it is underscored properties retained for future consideration.

Continuing on page 18 there is a listing for [85] Baltimore, a total of 24 units. The recommendation was

perhaps change the name brand and retain the location. Continuing to page 19.

(Whereupon, the first three paragraphs of page 19 were read into the record by Mr. Woodstock.)

Was that portion of the report implemented?

A. No, because what we implemented is what I described before and the alternatives we gave people in the Gas and Go stations and alternatives we gave people in all other locations. That is what was implemented.

Q. None of these locations continue to be dealer operated?

A. Some of them do, yes. Some of them are gas and go now.

What I am saying is we didn't treat them any differently than stations in the two categories I described before.

Q. Do these still have the BP brand on them or are some of them converted to William Penn, if a dealer chose to stay there?

[86] A. That's correct.

Q. What, both? Some of them have William Penn?

A. Yes. The Gas and Go's are BP and the conventional stations are William Penn.

Q. How many of those can you identify as Gas and Go's?

A. You talking about the Baltimore list now?

Q. Yes.

A. Eight.

Q. Leaving a total of 16?

A. Yeah, some of these I've never – they don't ring any bells for me, at all.

Q. Were those 16 dealers that remained there informed these were potential Gas and Go stations and they were to remain there as dealers pending the determination in-house by BP?

A. No. Because we have, in most of these cases – I say this simply because these locations are not familiar to me. We have decided that these are to remain conventional stations.

Q. At the time that this portion of the program was implemented, had it already been decided that they were going [87] to remain conventional?

A. You are saying September 1973?

Q. Yes. Or, were these properties retained as potential sites for Gas and Go outlets?

Either you know or you don't know

MR. LEWIN: The date is the problem because this report is November 3, 1972. If you are talking about that point in time, conceivably once again if you're talking about September 1973; there is a different answer. If you are talking about last month, conceivably there could be an entirely different answer. What date are you talking about?

Q. Let's start with June 1973. That's when I believe they implemented that.

MR. KING: This is November, 1972.

A. This report is November 1972. This is June 1973 and we moved to Wilmington and formed our current real estate organization in August of 1973.

MR. KING: Yes, September 1st.

A. At that time, these people began reassessing all of these locations.

Now, let's go back to your question. If you would repeat it again, we can talk about the specifics again.

[88] MR. LEWIN: I think the question you asked of the list that appears on page 18 of the November 3, 1972 report was were the dealers at those locations advised that the company was considering converting their stations to Gas and Go.

Was that your question?

MR. WOODSTOCK: Right.

A. Probably not, but I don't know for sure.

MR. KING: That's in November of 1972. The dealers were all told by letter in September of 1973 something that was totally different than was envisioned in November of 1972 and our facts were that probably of those stations that were listed as potential, we may have changed our minds on a whole batch of them by then and decided they were Gas and Go, let's quit horsing around, let's bite the bullet and go and do that. Some of them, we may have decided they're not. So, what happens in September of 1973 and what was projected in November 1972, are two different things.

Q. They were not told in 1972? They were all notified by letter in 1973, including all locations that [89] were perhaps potential BP sites that were kept dealer operated to retain the zoning use permit, is that correct?

A. We did not string any dealer along to protect our use permit, if that's what you are getting at.

This whole thing that is described here of working out a mutually acceptable arrangement to keep the station operating has not entered the picture. Again, we operated under two plans for two kinds of situations or two situations.

MR. KING: The plan that was implemented in September of 1973 which is the first time dealers were told what their status was and what alternates they had, was totally different from the plan that was thought about by Hickerson when he wrote this in November of '72 concept. It was a different world and we made it a point that every dealer understood how we looked at his station. If he was in one that was going to be a Gas and Go, we told him. If he was in one that we didn't know what was going to happen, we told him we didn't know. If he was in one that we knew was not going to be one, we told him that, too.

[90] Q. Let's change tracks just briefly and then I will be finished.

At what time was the latest request by BP for allocations made to all FEA? What was the last one in time?

A. Last week.

Q. Is it done on a monthly basis? I believe you said it was a permanent allocation.

A. It's done on a station basis.

Q. For each station?

A. Yes. If we acquire a new site, we have to go through the procedures described in the regulations to obtain a base volume for that location.

Q. Was any base volume changed for Gas and Go locations which I would imagine would be keyed to getting an allocation from FEA?

You are saying these are all done separately at individual dates and they are not done all at one time, for example, for the Baltimore market.

A. Let's get straight the difference between Gas and Go stations on sites where BP had a conventional station and sites we are acquiring today which we did not have any title to or any ownership in previously.

[91] Q. Okay. I'm talking about the BP Gas and Go's in operation today that have not been newly constructed within the last six months.

A. The bulk of those applications were submitted in May of last year.

Q. May of last year?

A. That's right.

Q. That were approved?

MR. KING: May 29th of this year.

Q. That was 60%, I believe.

MR. KING: One whole year later.

A. On an average, yes, 65% of the requests.

Q. Was there any dealer reaction, William Penn dealer reaction to those approvals that you know of?

MR. CAMPBELL: Part of the FEA procedure is to write to all competitors in the general vicinity of any outlet, be it ours or a dealer outlet, any outlet, and solicit their comments. That is part of their requirements. They received some comments from William Penn dealers, not very many, and some from other dealers.

Q. I think I am finished, but I would like to reserve [92] some time for redirect.

MR. PRESTON: You have that, even without reserving it.

(Whereupon, a short recess was taken.)

CROSS-EXAMINATION OF MR. KING

BY MR. GREENWALD:

Q. As I understand it, you are vice president of marketing at BP, correct?

A. Correct.

Q. How long have you served in that capacity?

A. Since May, 1972.

Q. Prior to May, 1972, tell us in what capacity you served for BP.

A. Prior to May of 1972 I was regional manager in the SOHIO operation in Toledo; the year before that, division sales manager of Toledo for Standard Oil Company of Ohio.

Q. Immediately prior to becoming Vice President, what basically were your duties for SOHIO?

A. I was in charge of the marketing operation in Northwestern Ohio, in Southeast Michigan, encompassing the retail service station operation sales to the consumer [93] trade, heat oil sales, our real estate activity, distribution activity, maintenance activities In that whole area.

Q. That included operations, did you say?

A. Yes.

Q. And prior to that what did you say you were?

A. Prior to that, I was the Division Sales Manager primarily responsible for just sales versus the operating end of it as distinguished from operating pieces of marketing, really, but it was a very similar kind of thing. Our organization changed. We didn't used to have in the Ohio regions. We just had divisions. So, ostensibly, for tactical purposes it was a very similar job of a narrow geographic area than the region manager.

Q. That was approximately –

A. Between May of 1962 until two years later, May of 1974. 1964, I mean.

Q. Then from May of 1964 to early 1972, you were regional manager?

A. Right.

Q. Now, what did you do prior to becoming division sales manager?

[94] A. I was the employee relations manager in the Marketing Department.

Q. What were your duties there?

A. To act in a staff capacity working with the marketing management, responsible for advising them in areas of labor relations, benefit plans, compensation programs, training.

Q. In connection with that capacity, you also dealt with the operations phase of the business, I gather?

A. Yes, sir.

Q. During what years did you act in that capacity?

A. Between 1959 and 1962.

Q. Now, prior to becoming personnel manager, what did you do?

A. I was in a similar position in the retirement end of our operation.

Q. By our operation, you are still talking about Standard of Ohio?

A. Right.

Q. What were your duties there?

A. Very similar. They were marketing except in the [95] refining end of the business. I started with SOHIO in February of 1948 and worked through various employee relations kinds of assignments up until I went out as the division manager in Toledo in 1962.

Q. And you've been with SOHIO and BP continuously since 1948, is that correct?

A. Correct.

Q. What did you do prior to coming with SOHIO in 1948?

A. I went to college and served three years in the Navy.

Q. Where did you go to college?

A. Rutgers University.

Q. What was your major course of study there?

A. I was a Liberal Arts major.

Q. I don't suppose you took any course in oil economics?

A. No. My objective at that point in time was the labor-relations end of the world.

Q. Now, during your direct examination you referred a number of times to BP trading areas. Did BP's trading [96] areas overlap State lines?

A. A trading area in our definition of them for pricing purposes is a relatively small area. For instance, in Baltimore, I think just pulling 17 trading areas we would have in the Metropolitan Baltimore for pricing purposes. When you get out of the State in more rural sections, there would be perhaps larger and they might overlap state lines.

Q. I have nothing further. Thank you.

CROSS-EXAMINATION BY MR. DROGULA:

Q. I believe you stated earlier that BP has no refineries, is that correct?

A. No, sir. We have a refinery market in Pennsylvania. We have two refineries at the time of the merger, one of them in Port Arthur, Texas and one of them at Marcus Hook and at the time of the Florida-Georgia divesture to American Petrifina, the Texas Refinery went to that. We have this refinery in Marcus Hook which we spent $180 million on and made it into a decent plant.

Q. Does BP produce crude oil?

A. We are a subsidiary of SOHIO. BP, itself, does not produce crude oil. SOHIO, the parent, produces crude [97] and 10% of its refinery capacity.

Q. How many refineries does SOHIO operate?

A. Two. There are three refineries in the SOHIO company. One is a BP refinery here in Marcus Hook and two in Ohio. One is at Toledo and one at Lima.

Q. Does BP receive premium products from SOHIO Refineries?

A. Yes, through trade and exchanges, basically.

Q. Are you aware, Mr. King, that SOHIO, for purposes of the Federal Regulatory program is classified as an independent or crude poor refinery?

A. Yes.

Q. Are you aware of that name, SOHIO as a refinery which purchases more than 70% of its crude oil feed stock from sources it neither owns nor controls?

A. Correct.

Q. Are you also aware that then because SOHIO is an independent refiner that it is more heavily dependent on so-called new crude oil or foreign oil for its refinery feed stock?

A. I didn't know – all I knew is as an independent

[98] refiner, we had to purchase at least 70% of our through put from some other source than our own control.

I wasn't aware it made any difference whether it was old or new.

Q. From your 27 years with SOHIO and BP, are you familiar with the term the two-tier pricing system?

A. I am.

Q. Are you aware that means there is an item known as old oil which the Government controls at approximately $5.25 per barrel?

A. Correct.

Q. Are you aware there are other items known as new oil or released oil which is domestic petroleum and which is permitted to float at the market price?

A. Correct.

Q. You are aware that foreign oil imported into the United States is also uncontrolled.

A. Correct.

Q. Are you also aware SOHIO, because of its status as an independent refiner, experiences higher crude acquisition costs than other refiners who are crude rich or who rely [99] more on old oil?

A. Correct.

Q. Now, from your experience in the industry in refiner A were refining crude oil in which it had a laid-in inventory cost of $9 per barrel and refiner B were refining crude oil in which it had a laid-in cost of $12 per barrel, which refiner would have the higher cost in the petroleum products it produced?

A. Obviously the one that paid the higher price for crude oil.

Q. And which refiner would most likely have the higher tank wagon price to its dealers?

A. The refiner who had to pay the higher crude oil price.

Q. If the dealers of both refiner A and refiner B were to operate with the same cost and the same mark-up, which refiner would find its product posted at the gasoline pump at a higher price?

A. Refiner B who has the higher fuel cost.

Q. Would you agree the direct marketing technique offers an opportunity for refiners experiencing higher [100] crude oil prices to at least offset, in part, the advantage which Refiner A, the crude rich refiner, enjoys in the market place?

A. Correct.

Q. In May of 1973 when the BP Northeast project report was issued, would you agree there was generally a period of time of crude oil shortages?

A. Yes. I think I'm correct in recalling that the supply of petroleum products started to decrease in the beginning of 1973.

Q. Would that place an additional cost burden on independent crude poor refiners such as SOHIO?

A. It very definitely did.

Q. Would that perhaps explain in part why BP was interested in investigating the possibility of the direct marketing technique?

A. That certainly would be one of the factors that would be considered and was considered by us to maximize, to make the best we could out of a bad situation.

Q. Generally, from your experience in the Maryland marketing area, which is higher, the dealer wagon price or [101] the spot market price?

A. Generally, the dealer tank wagon is higher than the spot price.

Q. So that if wholesalers and jobbers were to supply their retail outlets with gasoline purchased on the spot market, would their cost be comparable to, or lower than BP dealers paying the tank wagon price?

A. Would you ask that question again.

(Whereupon, the question referred to above was read back by the reporter.)

A. I think that obviously has to be a function of what our dealer tank wagon price is to the spot market and at any given time – in other words, I agree that in general dealer tank wagons are higher than the spot market but that doesn't say BP is because an independent refiner it has considerably higher crude costs to pass on than others. So, the spot market is not controlled by BP, it's controlled by a lot of these other people. So that we may have a tank wagon that is higher than others in relation to that so that our dealers might have a higher price than these wholesalers who are supplying these other independents or these other [102] people in here. This is the cross we have had to bear for a couple of years here and why our prices generally have not been competitive.

It's only in the last few months when through the allocation program and the entitlement program of companies like ourselves that we have been able to be more competitive. Prior to the entitlement program, this $2 kind of number that wasn't fair – and that was the kind of differential we suffered with and our customers and the dealers suffered with because of our cost.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q. Gentlemen, I'm going to hand you the document that was produced to all the parties in this litigation subject to protective order. It is entitled "Gas and Go Price Survey."

I will ask you if you can identify it?

MR. CAMPBELL: Yes.

Q. Would you indicate when that survey was made?

MR. CAMPBELL: Well, the prices reflected on here are November 13, 1974 and July 7, that's December 7, December 14 and January 7, 1975.

[103] EXAMINATION OF MR. CAMPBELL

BY MR. ABRAMS:

Q. I see you are looking at the fourth page of that document which consists of 19 pages.

A. Yes.

Q. Could you flip through that and see that all the pages which indicate a survey have dates and locations on them? Is that correct?

A. Yes.

Q. Do you know who performed this survey?

A. Probably the manager of the respective station shown at the top of each survey.

Q. And then he reported these figures or wrote down these figures and gave it to his superior?

A. Yes.

Q. Can we go back to the fifth page? Do the prices indicated on line with the BP designations – are they company or dealer operated facilities?

A. Company operated.

Q. Is there an indication of whether these other stations are company or dealer operated?

[104] A. No, there is no indication on this survey whether they are company or dealer operated.

Q. Thank you. I am going to hand you another document that was also produced subject to the protective order in this litigation. It's 16 pages. The first page states on top, "Competitive Pump Prices".

Baltimore, it has a list of companies and indicated number of stations. I will ask if you can identify this document.

A. Yes, I can identify it.

Q. Can you say how it came about?

A. This is a summary of a number of price surveys like the previous exhibit.

Q. Would they also perform by your – would you say sales representatives?

A. By our station manager at company operated stations, by sales representatives and by supervisors.

Q. What does this first page indicate?

A. Across the top it indicates regular pump prices exclusive of tenths of cents per gallon and down the left-hand margin are various companies.

Q. Do the numbers in the boxes represent the number [105] of stations of those companies posting at that price which is indicated above?

A. That's correct?

Q. The ninth page of that document is entitled, "Regular price tenths omitted." It has major brand stations average, predominate and private brands.

Could you elucidate on what that reflects?

A. This would be a further summary of the previous page we just discussed which shows the average retail price of regular gasoline for the stations surveyed of each competitive brand and then the price at which the largest number of stations for a particular brand that were surveyed were posted.

Q. What does Gas and Go mean, as indicated on that sheet?

A. Those are BP Gas and Go service stations.

Q. Does it have a price there of their posting?

A. Yes.

Q. That's the number right to the right of the word Gas and Go?

A. That's right. It's under the average column.

[106] Q. Thank you. I would like these marked for identification.

(Whereupon, documents referred to above were marked as Plaintiff's Exhibits 1 and 2.)

Q. Thank you. I have no further questions.

CROSS-EXAMINATION OF MR. KING,

BY MR. LEWIN:

Q. Mr. King, can you tell us how Standard Oil Company of Ohio markets gasoline in the State of Ohio?

A. Standard Oil in Ohio sells upwards of 80% – sells gasoline primarily through retail outlets numbering 2800 about now. Most of these are dealer operators but which of that 2800 approximately 300, 700 to 800 are their company operated stations.

Q. And for what period of time has the Standard Oil Company marked both through dealer operations and direct retailing?

A. SOHIO has been alone in the industry and its company operated service station operation and has been doing this for at least 30 years that I have been associated [107] or 27 years with the company.

Q. Is there any, in your judgment, expertise required of a refining company to operate company operated retail outlets?

A. I think very definitely.

Q. Based on your experience as you have testified to earlier, as a regional manager and district manager in Ohio, what has been the market conditions, the state of the market in Ohio, having both company operated stations and dealer operated stations?

A. I guess I don't understand exactly what your question is aimed at. As far as I am concerned, the presence of the company operation in the State of Ohio has worked to the benefit of all in terms of to the consumer and again in terms of lower prices, in terms of more convenient hours of operation. Typically, these are stations that are open 24 hours a day, seven days a week, this kind of thing, as contrasted to dealers who

might open on a part of either day or week. They have the advantage of setting a standard of housekeeping and service to the customer that hopefully the dealer organizations emulate [108] of follow so they can improve the service.

I think that's one of the ingredients why SOHIO in that market had as high as 30% of the gasoline sold through its SOHIO stations.

Q. Does the presence of company operated SOHIO stations, in your experience, have any adverse affect upon dealers as a group?

A. Well, I am certain that the presence of the company operated stations in a City like Cleveland where SOHIO dealer operations – their average through-put per station is in the 40,000 to 50,000 gallon a month category, that the fact that having that volume – these dealers generally up price. By that, I mean, they price the higher price than what we think is justified at a salaried station. In the times when the margins to dealers were for regular gasoline between seven and eight cents, the relationship, the prices were almost identical at salary stations and dealers. Now, it's changed in the last several years. I'm talking about not just two, I'm talking about six or seven, where a great many of these dealers have decided, gee, I'm going to get 10 cents a gallon instead of seven to eight [109] and as a result the public is paying more for that gasoline than what they are at the company operated stations.

Q. Specifically, has the presence of company operated stations in Ohio had any impact on dealer turnovers, driving dealers out of business?

A. No. I think again on the contrary our share of the market at 30 has provided a tremendous stability among dealers. The SOHIO dealers turnover is probably

one of the lowest in the industry. As I said, our company operation is a very significant part of that operation in Ohio. I said, I think it adds to the image, either in terms of the services to the customer, in terms of enabling dealers to be successful. If, for instance, in BP, where you are talking about one or two per cent of the market to have some dealer up prices to get a higher margin – he is not going to go under because his volume isn't the same. When you have that significant a share of the market, you've got a lot of things going for you and dealers can get higher prices for their products, as evidenced by what is going on in Ohio.

(Examination concluded.)

- - - - - - - - - - -

[110] State of Maryland, City of Baltimore, SS:

I, James F. O'Brien, Jr., a Notary Public in and for the State of Maryland, County of Prince George's, do hereby certify that the within named CHARLES H. KING and J.D. CAMPBELL, personally appeared before me at the time and place herein set out and after having been duly sworn according to law, were interrogated by counsel.

I further certify that the examinations were recorded stenographically by me and then transcribed from my stenographic notes to the within typewritten matter in a true and accurate manner.

I further certify that the stipulations contained herein were entered into by counsel in my presence.

I further certify that I am not of counsel to any of the parties, nor an employee of counsel, nor related to any of the parties, nor in any way interested in the outcome of this action.

As Witness, my hand and Notorial Seal, this ___ day of July, 1975, at Baltimore, Maryland.

Notary Public

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-10

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PHILLIPS PETROLEUM COMPANY,
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On Appeal from the Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE
and
BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

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The Pacific Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae* in support of the appellants pursuant to this Court's Rule 42. Consent to the filing of the brief has been granted by all counsel for the appellants. Consent has been denied by counsel for the appellees. All responses have been lodged with the Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation

in matters affecting the broad public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Twelve of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community and is in the furtherance of the public interest. The Board of Trustees has approved the filing of the *amicus curiae* brief in this matter.

Pacific Legal Foundation requests permission to file an *amicus curiae* brief because it firmly believes that the decision of the Court of Appeals of Maryland upholding the Maryland divestiture law will have great adverse effect upon the general public, for as was found by the trial court, the law is "inversely related to the public welfare."

If that law stands, it will reduce competition resulting in increased prices for the consumer while at the same time limiting his selection and reducing the quality and quantity of services available. All marketers should have a right to participate in the retail marketing of petroleum products, for consumers are best served by a mix of all types of company and dealer operations. This the law prevents.

What is more disconcerting is the future utilization of the precedent that judicial approval of such a law will encourage. If the holding that the Maryland law is constitutional is allowed to stand, other states will be encouraged to enact similar petroleum divestiture laws, which actions will increase the adverse effect on consumers.

Even more alarming is the threat that approval of this law will constitute judicial sanction of divestiture laws in all industries that are now vertically integrated and those in which retailing is conducted by both company-operated and dealer outlets, some of which are automobile and truck dealers, fast-food restaurants, hotels and motels, and rental services. (United States Department of Commerce, Franchising In the Economy 1975-77, Tables 1-3.)

Divestiture laws constitute unreasonable state interferences with economic forces and an attempt to restructure our free enterprise system by restricting economic freedom without justification. They are totally in conflict with economic and free enterprise principles. Indeed, they would change the very nature of our free enterprise system. They would place a straightjacket on the rational utilization of investment capital.

The Maryland Court of Appeals' decision, in holding that the divestiture clause does not violate the Commerce Clause, is in conflict with the three-pronged balancing test established by this Court. *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970), and recently reaffirmed in *A & P Tea Co. v. Cottrell,* 424 U.S. 366 (1976), and *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 (1976).

When the law is measured by the *Pike* test it is found wanting, for:

1. The law furthers no legitimate local interest, rather it injures the general public;

2. The means utilized are totally irrational, for present federal and state laws achieve the desired ends without destructive inefficent divestiture; and

3. The Maryland divestiture law unduly and unjustifiably burdens interstate commerce by:

A. Restricting competition and injuring the consumer;

B. Disrupting the normal interstate flow of investment funds and petroleum;

C. Dislocating the intricate interstate petroleum refining and marketing system; and

D. Imposing artificial rigidity on the long established historic economic pattern of the petroleum industry, thus reducing free competition and economic freedom of choice.

The Maryland Court of Appeals' decision is in conflict with *Lawton v. Steele*, 152 U.S. 133 (1894), and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), in that the divestiture law violates all the criteria established by those cases in that:

1. There is no menace to the general public which requires such a drastic dislocation of a legal business;

2. The law protects a special class of merchants to the detriment of the general public;

3. The means utilized are unreasonable, irrational, and unnecessary; and

4. The loss to the petroleum industry is disproportionate to any good to the public.

Pacific Legal Foundation respectfully submits that the magnitude of the adverse impact of this law upon the consumers of this nation will be tremendous and therefore respectfully requests permission to file the annexed *amicus curiae* brief so that the issues as they affect consumers may be fully and completely addressed.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of *amicus* has been set forth in the preceding motion to file this brief.

OPINION BELOW

The opinion of the Court of Appeals of Maryland reversing the judgments of the Circuit Court for Anne Arundel County is officially reported at 279 Md. 410 (advance reports) and unofficially at 370 A.2d 1102 (advance reports). The supplemental opinion of

the Court of Appeals on motions for reconsideration and stay of judgment is officially reported at 279 Md. 456 (advance reports).

INTRODUCTION

The question presented in this case is whether or not Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, and codified in the Maryland Annotated Code (1957), Art. 56, Section 157E (1972 Repl. Vol. 1976 Cum. Supp.), which will be henceforth referred to as the Maryland divestiture statute, is in conflict with the Commerce Clause of the United States Constitution in that:

1. It restricts free competition and injures the the consumers not only of the State of Maryland but of the United States;

2. It dislocates the intricate interstate petroleum financing, refining and marketing mechanisms to the detriment of the consumer; and

3. It imposes artificial rigidity on the historic economic pattern of the petroleum industry.

The divestiture law also is an unjustified utilization of the police power in that there is no evil to be corrected by it, rather it is legislation enacted to further the interests of a small special interest group to the detriment of society as a whole.

The Maryland divestiture law not only establishes a precedent for petroleum divestiture laws in other states, but also it will be interpreted as judicial approval of laws for divestiture of any vertically integrated company in any industry. Such a result will alter our entire free enterprise system to the detriment of the people of this nation.

ARGUMENT

I

THE MARYLAND DIVESTITURE LAW IS INVALID UNDER THE COMMERCE CLAUSE FOR IT UNDULY BURDENS AND DISRUPTS COMMERCE IN PETROLEUM AND INVESTMENT CAPITAL, IT SERVES NO USEFUL LEGITIMATE LOCAL INTEREST, AND IS IRRATIONAL AND NEEDLESSLY OPPRESSIVE

The Commerce Clause does more than confer on Congress the power to regulate commerce among the states. It creates an area of free trade and imposes limitations on the power of the states, by prohibiting them from unreasonably burdening or disrupting interstate commerce. *Boston Stock Exchange v. State Tax Commission,* ..... U.S. ....., 50 L. Ed. 2d 514, 523 (1977). Defining those limits has been the continuing responsibility of this Court. *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769 (1945). It is the task now before this Court.

The three-pronged balancing test applied in making that evaluation is well established by this Court's decisions. As was stated in *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970), and recently reaffirmed in *A & P Tea Co. v. Cottrell,* 424 U.S. 366 (1976), and *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 (1976):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 US 440, 443, 4 L Ed 2d 852, 856, 80 S Ct 813, 78 ALR2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Less weight is given to the local interest in the balancing process when the law, as here, involves matters purely economic in nature and when they are closer to the concerns which the Commerce Clause committed to Congress, rather than to those concerning health, safety, or fraud. *H. P. Hood & Sons v. Du Mond,* 336 U.S. 525, 531 (1949); *Pike,* 397 U.S. at 143; *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 442 (1960).

This "balancing test" presents three questions for this Court. They are:

1. Does the state law in its practical operation burden, restrict, or interfere with interstate commerce?

2. Does the state law further a legitimate local public interest?

3. If a legitimate local interest exists, but the law does burden interstate commerce, is that burden

excessive as compared with the putative local benefit? Or to rephrase the question, are the means reasonable for the accomplishment of the desired end or are there other less burdensome means?

We submit:

1. The law unduly burdens and disrupts interstate commerce;

2. The law furthers no legitimate local interest; rather, it promotes local special interests and injures the general public; and

3. The means utilized are totally irrational, for present federal and state laws achieve the desired ends without destructive, inefficient divestiture.

A. THE DIVESTITURE LAW UNDULY BURDENS AND DISRUPTS INTERSTATE COMMERCE

As all of the gasoline sold in Maryland is produced and refined in other states and shipped into Maryland, this law affects interstate commerce. *National Labor Relations Board v. Reliance Fuel Oil Corporation,* 371 U.S. 224 (1963). But more is involved than the flow of gasoline across state borders.

At the outset, we must ask what is commerce, for the Constitution does not define what is and what is not commerce among the states. This has been the responsibility of the courts. The courts have met that responsibility and have by their interpretation of that clause advanced the solidarity and prosperity of this nation. *Allenberg Cotton Co., Inc. v. Pittman,* 419 U.S. 20, 32. This Court is called upon to do so again in this

case, for if this Court does not act, the petroleum industry will be disastrously dislocated and the consumer will be seriously injured.

Certainly commerce, protected by our Constitution, is more than the physical transfer of tangible items in trade. Commerce to be meaningful must include every aspect of interstate manufacturing, transportation, marketing, and financing, for the Commerce Clause prohibits any action that, either on its face or in practical effect, unduly impedes the free flow of trade between states. This means any law that in "practical effect" restricts, limits, curtails the volume of, interferes with, adds extra costs to, impedes, slows down, discourages, or deters interstate commerce. Further, it prohibits state action that hampers the ability of interstate marketers to compete with local businesses, by way of regulations or financial impediments which affect those marketers' financial ability and efficiency to compete.

The Commerce Clause prohibits a state from taking action that will discriminate against interstate investors, producers, or distributors. It protects against any law which dislocates intricate interstate marketing mechanisms or imposes an artificial rigidity on the economic pattern of industry resulting in the reduction of free competition. *Hood*, 336 U.S. at 537; *Pike*, 397 U.S. at 146; *Allenberg Cotton Co., Inc.*, 419 U.S. at 29; and *Toomer v. Witsell*, 334 U.S. 385, 404 (1948).

Certainly such an interpretation and application is in accord with the purpose of the Commerce Clause.

That purpose is to create free trade among the states and prevent the states from unduly interfering with commerce between the people of the states. *A & P Tea Co.*, 424 U.S. at 377. The result envisioned is to guarantee free competition and thereby protect the consumer from exploitation. As was so well stated in *Hood*, 336 U.S. at 539:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." (Emphasis added.)

Recently, this Court in *Hughes*, 426 U.S. at 806, after reviewing a number of cases in which it had been found that legislation violated the Commerce Clause, concluded:

> "The common thread of all these cases is that the State *interfered with the natural functioning of the interstate market* either through prohibition or through burdensome regulation." (Emphasis added.)

The Maryland divestiture law unduly and unjustifiably burdens interstate commerce by:

1. Restricting competition and injuring the consumer;

2. Dislocating the intricate interstate petroleum financing, refining, and marketing mechanism; and

3. Imposing artificial rigidity on the long established historic economic pattern of the petroleum industry.

1. The Law Restricts Free Competition and Injures the Consumer

As the purpose of the Commerce Clause is to guarantee free competition, and thereby protect the consumer from exploitation *(Hood, supra)*, the Maryland divestiture law is fatally defective for it destroys competition and exposes the consumer to exploitation. The trial court found:

> "[R]etail petroleum marketing in the State of Maryland is and has been a highly competitive industry." (E. 221.)[1]
>
> "Apart from restraining free competition, it was shown that divestiture would be harmful to competition in the industry, and would primarily serve to protect the independent dealers rather than the public at large. . . .
>
> "the court specifically finds that among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be eliminated, the effect of which would be anti-consumer, and that any law which had such effect would not be in the interest of the public at large. . . .

[1] "E." references as used herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

> "The court also finds from the preponderance of the evidence that the law will preclude all of some thirty-two producer-refiners not now in the State from ever entering the competitive market in Maryland, and vertical integration will be prohibited. Neither effect is in th [*sic*] public interest since competition is essentially for consumer benefit." (E. 243.)
>
> "The court finds that . . . apart from there not being demonstrated a real and substantial relation to the object sought to be attained by the means selected, the evidence presented before it indicates that the statute is inversely related to the public welfare." (E. 244.)

The recognized experts who testified for the plaintiffs stated the law will reduce competition in the retail market, will increase the price of petroleum products, will reduce services to the consumer such as the quality and number of products available; the reliability of products and services; the range of prices; cleanliness of stations and station employees; speed of driveway service; innovations in service; product development; and merchandising methods.[2]

Even the state's only expert witness, Dr. James M. Patterson, was of the opinion that the law would reduce competition and services available to the public for there are advantages to the public by allowing

[2] Theodore Levitt, Professor of Business Administration, Harvard University, E. 395-96, 400, 402-04. Dr. Charles H. Berry, Professor of Economics and Public Affairs of Princeton University, E. 437-38, 445-46. Dr. Matityahu Marcus, Professor of Economics, Rutgers University, E. 468-70, 472. John H. Lichtblau, Economic Researcher and Executive Director of Petroleum Industry Research Foundation, E. 508-10.

company-operated stations. (E. 555, 569-70, 573, 581, 584.)

As the trial court found and the state's only expert witness, Dr. Patterson, admitted: (1) independent refiner-marketers, such as Ashland, are procompetitive, yet the law will remove them from the market (E. 235); (2) the law is not consistent with sound economic principles in that it requires Hudson Oil to give up Maryland retail stations once it has built its refinery (E. 236); and (3) the law has negative aspects with respect to Commonwealth-PMC (E. 236).

Perhaps the full impact of the law on competition and price can be better appreciated when put in more specific terms. Eighteen interstate producers or refiners have 209[5] company-operated retail service stations in Maryland. (E. 70-71.) These stations must be divested either by sale or lease to independent dealers. Some companies will be forced to abandon the Maryland market. (E. 360, 388-89, 457, 492.) The ouster of this many competitors from the retail market will deprive consumers of the benefit of free competition, and is, standing alone, a violation of the Commerce Clause.

More than that the nature of the businesses being driven from the competitive market shows that divestiture will injure competition.

[5]According to the records of the Gasoline Tax Division of the Comptroller's Office, there were a total of 3,757 retail gasoline service station dealers in the State of Maryland as of July 1, 1974. For some brands of gasoline sold there were no figures available as to the number of stations marketing them. (E. 71.) The Court stated 229 retail stations would be subject to divestiture. (E. 244.)

The burden of the statute falls most heavily on independent refiners and "nonmajor" oil companies, for the majority of "major brand" stations are presently operated by independent dealers. (E. 70-71.) Most of the refiner or producer company-operated stations in Maryland are "private brand" stations (E. 69-71, 397), indeed these stations constitute the majority of "private brand" stations in Maryland. (E. 221, 383, 453, 456, 488-89, 492, 499.) The trial court found that most "private brand" stations generally emphasize price and sell at lower prices than most independent dealer-operated stations. (E. 221.)

These "private brand" stations must be company operated to survive. Such nonrecognized brands must retail their products at prices lower than those at which advertised brands are sold. (E. 488-89.) To sell gasoline at a lower price, "private brand" operations must maintain high throughput and low overhead. (E. 454, 457-58, 507.) These objectives are achieved by small investment in the property, no advertising, no service facilities and no automotive maintenance and repair services, no credit cards, long hours of operation—typically 18 hours a day, 365 days a year—few employees, and a skeletal administrative force. (E. 382-87, 455, 491.) It is the experience of Kayo, PMC, Ashland, and Hudson Oil Company (Hudson) that the maintenance of low overhead, low-priced image, long hours, and competitive prices requires tight control of the station's day-to-day operations which would be legally and practically impossible with independent dealers. (E. 388, 453, 456, 489, 492, 499.)

The inability to operate "private brand" stations on other than a company-operated basis is evidenced by the fact that most "private brand" marketers, including some that have experimented with dealer operations, use company operations to the total exclusion of dealer operations. That is true for Kayo, PMC, and Ashland, as well as for Hudson. (E. 381, 453, 488-89, 499.) Dealer operations have been tried by "private brand" marketers and they have been unsuccessful. (E. 453, 488-89, 499.) When Hudson experimented with dealer stations which involved about 30 of its then 120 stations, it "completely lost control of [its] stations. We had dirty stations. The dealer would not carry out the orders, and of course we did not and were not able to enforce certain regulations because they were leased out; and we cancelled our leases and took the stations back over." (E. 499, 502.) In addition, the lack of service facilities and the high cost of gasoline makes PMC's operations unattractive to dealers. (E. 456-68.)

As the divestiture law will drive these price-competitive stations from the market it will limit competition and result in increased costs to the consumer.

In addition to forcing the withdrawal of present competitors, the law precludes 32 producers or refiners, not currently distributing their products in the Maryland market, from entering that market. (E. 243.) These companies utilize aggressive pricing strategies. (E. 401.) This will further restrict competition to the detriment of the general public.

Abandonment of operations by at least some of the present competitors in the Maryland retail gasoline

market would also affect supplies at the wholesale level. For example, Ashland is an important factor in the Maryland wholesale gasoline market. (E. 494, 577.) It would be extremely difficult for the company to remain in Maryland as a wholesaler if it lost its retail outlets. The likely result would be diversion of its activities into other states. (E. 493.) Such a result would injure the public by reducing supplies available to independent gasoline marketers and weaken that segment of the retail market which sells gasoline at discount prices. (E. 577.)

If the marketplace is to behave competitively, it must have many competitors. This law achieves the opposite result, for it removes aggressive price competitors from the marketplace, depriving the public of the benefits of competition and lower prices. This is clearly a violation of the Commerce Clause, for it defeats the purpose of that clause as envisioned by our founding fathers and given life by our courts. The divestiture law is thus invalid.

2. The Law Disrupts the Normal Interstate Flow of Both Investment Funds and Petroleum and Dislocates the Intricate Interstate Petroleum Refining and Marketing System

A state law which interferes with the natural functions of the interstate market, *Hughes, supra,* or dislocates the intricate interstate marketing mechanism, *Allenberg Cotton Co., Inc.,* 419 U.S. at 29, violates the Commerce Clause.

The Maryland law causes such disruption. It destroys an established retail marketing structure. It prohibits entry into marketing by new competitors, if

they are producers or refiners. It disrupts the wholesale market by prohibiting backward integration. It prohibits natural growth, with resulting cost reductions. It discourages the flow of investment capital into Maryland and into the stocks of affected companies for it causes substantial capital loss through forced sales, and reduces profits by eliminating an entire operating segment of the affected industries, their retailing branches; this in turn adversely affects the economic stability of those companies and discourages the flow of investment capital into them.

To appreciate this disruption an overview of the petroleum industry will be helpful for the marketing of petroleum products in Maryland is part of an intricate and complex national, indeed international, financial and marketing mechanism. A dislocation of that system by one state will adversely affect the consumers, not only in that state, but in all the other states, for it will adversely affect production, refining, distribution, and investment.

In the United States there are some 15,000 independent crude oil producers; 110 small refiners and 30 major refiners (some of which are also crude producers); 598 importers (other than refiners) of both crude and refined products; 200 gathering systems between crude producers and refiners (pipelines, etc.); 26,000 wholesalers; and 268,000 retailers.[4] This totals to more than 300,000 firms which perform the following functions:

[4]Federal Energy Administration Regulation—Report of the Presidential Task Force, 1977, p. 40.

1. exploration and production of crude oil;
2. gathering and purchasing of crude;
3. transportation of crude to refineries;
4. refining;
5. marketing, both wholesale and retail; and
6. research and development.

Firms operating in the petroleum industry are of greatly varying sizes. At one end are the fifteen to twenty-five major integrated petroleum companies, such as Exxon, which engage in all functions performed by the industry. At the other end are the many thousands of independent companies whose activities are confined to just one activity within the industry.

In the petroleum industry there has been a historical pattern of vertical integration, both forward and backward, for very sound economic reasons. Integration of operations (production of crude, refining, and marketing) provides genuine economic efficiencies with savings passed on to the consumer. The record establishes this and the compelling reasons for it.

With this overview in mind, we can now more fully appreciate the disruption to this intricate marketing system that divestiture will cause.

In evaluating this disruption one fact is paramount; that disruption will adversely affect interstate commerce—for Maryland has no producers of crude nor has it any refineries. All petroleum products marketed in Maryland are produced and refined elsewhere and

shipped into Maryland. (E. 186.) Thus, there will be a shift from the normal flow of petroleum products to Maryland and a disruption of interstate commerce. (E. 405.)

Retail Market System

If this law stands, 209 outlets now in operation will be divested. (E. 388-89, 456-57, 460, 492.) The disruption that will result is obvious.

Wholesale Market System

Forced abandonment of operations by at least some of the present competitors in the Maryland retail gasoline market would also affect supplies at the wholesale level. For example, Ashland is an important factor in the Maryland wholesale gasoline market. (E. 494, 577.) It would be extremely difficult for the company to remain in Maryland as a wholesaler if it lost its retail outlets. The likely result would be diversion of its activities into other states. (E. 493.) This will disrupt the marketing system and have interstate impact.

Refining System

Under the law, no gasoline retailer now operating will be allowed to integrate backwards to either refining or production. (E. 438.)

Historically such backward integration has been the traditional growth pattern in petroleum marketing as evidenced by the growth of Exxon and many other companies. (E. 402-03.) This pattern is continuing to evolve today, as demonstrated by Hudson. Hudson has approximately 315 retail outlets in 36 states, including five stations in Maryland. All are

company operated. (E. 498.) Recently Hudson decided to construct a refinery to provide the company with its own source of refined products. (E. 499-500.) When the refinery comes "on stream," Hudson's competitive posture improves, but this law will force the company to divest itself of its retail outlets. (E. 500.) The state's only expert witness concedes this would be detrimental to the Maryland consumer. (E. 584.)

Not only will the law prevent backward integration, it will disrupt refining operations.

Because of the capital intensive nature of a refinery operation, it is necessary from an economic standpoint to have the refinery operating at peak levels. (E. 487-91.) This is accomplished in part through an assured marketing arm for the refined products. (E. 509.) For oil companies such as Exxon, Shell, and Gulf, which market largely through independent dealers, the dealers serve as the principal outlet for gasoline from the refineries. For companies such as Commonwealth and Ashland, which market "private brand" gasoline through company-operated stations, the stations serve as assured outlets. (E. 489-91.) The uncontroverted testimony shows that the presence of company-operated stations has enabled Ashland to insulate itself from the loss of substantial volumes of uncontrolled business and to remain an effective competitor. (E. 490-91, 509.) The act, by stripping the integrated companies of their regular market, will dislocate their refining operations and thereby disrupt the complex refining and marketing system.

Investment Market

Another aspect of interstate commerce which cannot be overlooked is that of interstate investment. The act will cause dislocation in the petroleum capital market. It will create positive disincentives for certain firms to invest capital and do business in Maryland. (E. 405.) Certainly the flow of investment capital is essential to interstate commerce and its flow in the normal channels of commerce is as protected as that of any product.

There are 32 integrated refiner-marketers of gasoline, who are multi-state retail operators, but are not now in Maryland retailing. They are potential entrants into the Maryland market, but the law denies them entry. These companies utilize aggressive pricing strategies. (E. 401.) In order to make such entry they must be able to maintain low prices and tight operating control over their stations. Long operating hours are needed to build the necessary volume and goodwill to make operations profitable. This cannot be achieved with independent dealers. (E. 401, 438, 491-92.) Their exclusion affects the flow of investment capital in interstate commerce.

There is further economic impact that will result in dislocation of the interstate refining and marketing system.

1. Producers and refiners will be denied profits from direct retailing of petroleum products. (E. 358.)

2. Producers and refiners will have to divest themselves of substantial capital investment in Maryland, probably at substantial financial loss. (E. 244.)

These losses will impact the availability of investment capital for all such vertically integrated companies, for such investment will be far less desirable. This will have a chilling effect not only on interstate commerce, but upon our entire national economy, for restrictions on the mobility of capital cannot have a good effect—only bad. This in and of itself is in violation of the Commerce Clause.

This law's ultimate effect on the intricate petroleum mechanism may prove to be even greater, for if it stands, it will afford a precedent and authority for petroleum divestiture laws in other states. Such laws will magnify the disruptive effect detailed above. The end result will be disastrous to the companies involved and to the public.

Even more alarming is the threat that judicial approval of this law will constitute judicial precedent for divestiture laws affecting all industries that are now vertically integrated and those in which retailing is conducted by both company-operated and dealer outlets, some of which industries are automobile and truck dealers, fast-food restaurants, hotels and motels, rental services for automobiles, trucks, and equipment, nonfood retailing, and softdrink bottling. (United States Department of Commerce, Franchising In the Economy 1975-77, Tables 1-3.)

If the Maryland law is a valid exercise of state power, then that power extends to all vertically integrated industries. Such law will change the basic structure of American business to the detriment of the public.

As this law disrupts the normal interstate flow of investment funds and petroleum and dislocates the intricate interstate petroleum refining and marketing system, it violates the Commerce Clause.

3. The Law Imposes an Artificial Rigidity on the Long Established Historic Economic Pattern of the Petroleum Industry which Results in the Reduction of Free Competition

This Court has held that if "the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of industry" in interstate commerce, it violates the Commerce Clause. *Hood, supra; Pike,* 397 U.S. at 146; *Toomer,* 334 U.S. at 404.

The Maryland divestiture law violates this prohibition for it artificially and unreasonably restructures the petroleum industry (E. 482) in a manner which is contrary to the economic forces which mandated the historic development of gasoline marketing into its present vertically integrated structure.

The law achieves this by dictating that all retailing of petroleum products must be done through independent dealers. History teaches that this is often unworkable and economically disastrous for the petroleum industry and ultimately for the consumers.

We have already treated in detail the intricate nature of the petroleum industry and its historical evolution and the economic reasons for this natural trend to vertically integrate. We shall not prolong this petition by doing so again in detail.

Indeed such a detailed analysis is unnecessary for it is patent that the law will restructure the petroleum industry as follows:

1. The law forces producers and refiners to divest themselves of established retail outlets, thus it restructures their long established business structure, it drastically alters their method of conducting business and it artificially dictates limits to areas of investment. It flies in the face of the historical development of the petroleum industry. It strips business of its right to economic choice.

2. The law closes the Maryland retail market to refiners and producers who have not as yet entered the retail market, but may at a future date desire to do so. Such restriction constitutes unjustified limitations on normal business expansion and progress.

3. The law prohibits retailers from integrating backwards into refining or producing, or in the alternative drives them out of the retail market in which they now function. Thus the law prevents normal economic growth. (E. 457.)

Very simply the law improperly imposes "a straightjacket on the appellee company with respect to the allocation of its interstate resources." *Pike,* 397 U.S. at 146.

Since the law imposes an irrational rigidity on the long established economic pattern of the petroleum industry it violates the Commerce Clause.

B. THERE IS NO LEGITIMATE LOCAL PUBLIC INTEREST SERVED BY THIS LAW; INDEED, IT INJURES THE PUBLIC WELFARE

The law serves no legitimate local purpose, for it is designed to protect limited special interests; thus it violates the Commerce Clause for it adversely impacts interstate commerce.

Although the state may shelter its people from menaces to their health or safety and from fraud, it lacks the power to retard, burden, or constrict the flow of interstate commerce for the economic advantage of a small class of its citizens. *Polar Ice Cream & C. Co. v. Andrews,* 375 U.S. 361 (1964); *General Motors Corp. v. Washington,* 377 U.S. 436, 462 (1964); *Baldwin v. Seelig,* 294 U.S. 511, 523 (1935).

In *Hood,* 336 U.S. at 542, the state denied a license for a new plant. Among the reasons were the increase in competition by diverting supplies of milk from other plants in the area and a tendency to deprive local markets of needed supplies during the short season. This Court recognized that to do so would exclude an entirely new foreign handler from coming into the state to purchase. This Court then held:

> "But here the challenge is only to a denial of facilities for interstate commerce upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end, as we have shown, always held to be precluded by the Commerce Clause."

In the present case the trial court found:

> "In all the more than one hundred eighty-five pounds of pleadings, motions, briefs, exhibits and depositions before this court, there is no concrete evidence that the act was justified as to the classes of operators singled out to be affected in order to promote the general welfare of the citizens of the State. Rather, it is apparent that the entire bill is designed to benefit one class of merchants to the detriment of another." (E. 244.)

The trial court further found that the statute did not benefit the public, but more, from the evidence presented, it found that "the statute is inversely related to the public welfare." (E. 244.)

The state's own witnesses conceded that the statistics compiled for the Gasoline Tax Division's Report, which allegedly formed the basis for the legislation, established neither a relationship between the survey results and the law, nor a necessity which would justify the act. The chief of the state's Gasoline Tax Division stated he had no evidence of any major oil company having misallocated among dealer-operated and company-operated stations, and that a state audit of Exxon and a consultation with Getty disclosed fair allocation. (E. 523, 527, 534, 540, 547.)

As previously set forth in detail, the law is destructive of competition, will injure the general public by limiting choice and services while at the same time increasing prices. Its sole purpose is to protect a small special interest class. This brings the law into conflict with the Commerce Clause.

C. THE LOCAL INTEREST CAN BE BETTER SERVED BY OTHER MEANS ALREADY AVAILABLE AND FAR BETTER DESIGNED TO ACHIEVE THE DESIRED END

The supposed purpose of the legislature in enacting this law was to promote and protect vigorous free competition by mandating that producers and refiners divest themselves of company-operated stations and that all retail outlets be operated by independent dealers. We have previously established that the law

will achieve exactly the opposite result. It will decrease competition to the detriment of the consumers.

Here we are concerned with the question of whether or not there are more adequate and less burdensome alternatives, for the Commerce Clause is violated if the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike,* 397 U.S. at 137. In making such a determination, one of the questions is whether adequate and less burdensome alternatives exist. *A & P Tea Co.,* 424 U.S. at 373. This in turn includes a determination of whether this law bears a real and substantial relationship to the object sought to be obtained and whether or not it is excessive in scope in its attempt to solve the problems.

Potentially, divestiture is a drastic and extreme means to achieve any local end.

In the case of this law, producer-refiners are required to divest themselves of 229 outlets amounting in value to over $12,800,000. The trial court observed, "there was no suggested way in which those affected could obtain a fair market price in arms-length transactions when the potential purchasers were well aware of the exigencies of the occasion. The result would amount to forced sales or leases on a buyers' market, with scant chance of obtaining a fair return on investments made in Maryland in good faith by the entities affected." (E. 244.)

There is no question that adequate and less burdensome alternatives already exist. The trial court found:

> "There was no proven detrimental effect upon the retail market caused by company-owned-and operated stations which could not be curbed by federal and state anti-trust laws." (E. 243.)

Indeed the state's only expert, Dr. Patterson, was of such a view, for the trial court cited Dr. Patterson's admission that he "was of the opinion that the scope of the law was overly broad." (E. 243.)

An appreciation of the extent to which present laws, both state and federal, better achieve the purported purpose of the divestiture statute without resorting to its destructive and irrational means is best achieved by separately evaluating each of the so-called problem areas separately.

1. Preservation of the Retail Dealers as Independent Businessmen, by Eliminating Unfair and Arbitrary Cancellations of Retail Contracts by the Vertically Integrated Markets, is Assured by Federal and State Laws

One of the state's contentions is that the act is necessary to preserve the retail dealer as an independent businessman and eliminate the takeover of dealer stations by vertically integrated producers and refiners. (E. 277.) This end is already assured by federal and state laws.

At the federal level, the Sherman Antitrust Act outlaws conspiracy in restraint of trade (15 U.S.C. § 1) and prohibits cancellation of retail contracts where the purpose is to create or maintain monopoly power (15 U.S.C. § 2).

Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)) proscribes "unfair methods

of competition and unfair or deceptive acts or practices in or affecting interstate commerce." This Act has been applied to unfair and arbitrary cancellations of retail service station leases as well as unfair lease provisions and coercive purchase requirements even though antitrust laws were not shown to be violated.

At the state level, the Maryland Gasoline Products Marketing Act, the Maryland "Dealer Day in Court" statute (Comm. L. Art. §§ 11-301, *et seq.*, Md. Anno. Code), extensively regulates all marketing agreements between petroleum distributors and dealers and expressly provides civil remedies both in the case of an illegal termination or cancellation of a marketing agreement and in the case of an unreasonable refusal to renew such an agreement.

These federal and state laws are far better designed to prevent the evil envisioned by the legislature than is divestiture. Even more they protect the public by assuring vigorous competition with resulting price reduction and an increase in available service and selection.

2. The Prevention of Retail Price Maintenance Schemes, Price Discrimination, or Predatory Pricing Thereby Ensuring Lower Prices for Consumers is Assured by Federal and State Laws

Another supposed evil the divestiture law is to protect against is price discrimination or predatory pricing which affects competition at the retail or any other level of the distribution system and the coercion of dealers to participate in retail price schemes.

At the federal level the Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.*, the Clayton and the Robinson-Patman Act (15 U.S.C. §§ 13, *et seq.)* are designed to prevent price discrimination and predatory pricing.

On the state level, Maryland has enacted three statutes which prohibit anticompetitive pricing practices. The Maryland Antitrust Act complements the federal antitrust statutes. (Comm. L. Art. §§ 11-201, *et seq.*, Md. Anno. Code.) The Maryland Unfair Sales Act (Comm. L. Art. §§ 11-401, *et seq.*, Md. Anno. Code), protects the competitive independence of the retail marketer by not permitting the distributor to prescribe in any way the retail price of the product (*e.g.*, motor gasoline). The Maryland Gasoline Products Marketing Act (Comm. L. Art. § 11-304(c), Md. Anno. Code) prohibits price setting by distributors.

Thus, both federal and state laws achieve the protection from price controls far more effectively and equitably than does divestiture.

3. Federal and State Laws Ensure the Uniform Allocation of Gasoline Among All Dealers in Periods of Shortage

Another proposed justification for the divestiture law was the belief that producer-refiners in periods of shortages, such as the period of the OPEC oil embargo of 1973, favored the stations operated by themselves, and the fear that in future shortages they would again do so. Factually, there was no evidentiary support for this reasoning.

A state witness testified there was no evidence that a major oil company had misallocated. (E. 233.)

Indeed the state's survey of Exxon established that it had allocated fairly. (E. 232.)

Regardless of that, at the federal level, the Federal Emergency Petroleum Allocation Act of 1973 (15 U.S.C. §§ 751, *et seq.*), amended and extended by the Energy Policy and Conservation Act (Pub. L. No. 94-163 (1975)), and regulations promulgated thereunder (10 C.F.R. §§ 210-213) ensure that during times of shortage of motor gasoline, there shall be equitable distribution of supplies to meet regional needs and to preserve competition in the marketplace.

At the state level Paragraph F of the Maryland divestiture statute (56 Md. Anno. Code 157F) also provides for uniform and equitable allocations in "periods of shortage."

This summary review of federal and state law establishes that present laws are far better designed to achieve the ends which purportedly prompted the Maryland divestiture law without the drastic and unjustified hardship caused by that law.

II

THE MARYLAND DIVESTITURE STATUTE VIOLATES THE DUE PROCESS MANDATE OF THE FEDERAL CONSTITUTION IN THAT IT BEARS NO REAL AND SUBSTANTIAL RELATIONSHIP TO THE PUBLIC HEALTH, WELFARE, SAFETY, OR MORALS AND THEREFORE CONSTITUTES AN ARBITRARY AND CAPRICIOUS EXERCISE OF THE POLICE POWER

When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of the court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. *Bates v. Little Rock,* 361 U.S. 516, 525 (1960).

The classic statement of the law is set forth in *Lawton v. Steele,* 152 U.S. 133, 137 (1894). After recognizing that great discretion is vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests, this Court nevertheless held that such discretion is subject to judicial review and set down the standard for such review, to wit:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 595 (1962), the Court summarized the information needed to evaluate a law's reasonableness as follows:

> "To evaluate its reasonableness we therefore need to know such things as the *nature of the menace*

against which it will protect, the *availability and effectiveness of other less drastic* protective steps, and the *loss which appellants* will suffer from the imposition of the ordinance." (Emphasis added.)

The Maryland divestiture law violates all of these criteria for:

1. There is no menace to the general public which requires such a drastic dislocation of a legal business;

2. The law protects a special class of merchants to the detriment of the general public;

3. The means utilized are unreasonable, irrational, and unnecessary; and

4. The loss to the petroleum industry is disproportionate to any good to the public.

A. THERE IS NO MENACE TO THE GENERAL PUBLIC WHICH REQUIRES SUCH DRASTIC DISLOCATION OF LEGAL BUSINESS

To evaluate interest of the public we must first determine if there is in fact a menace to the general public.

The trial court found:

> "The Attorney General in his opening statement maintained that there was an evil at hand identified by the Legislature. Presumably, he referred to a contrived shortage of petroleum and heating oils, since this was the topic of the Governor's inquiry. He stated that his witnesses would show that divestiture would restore and maintain free competition; that the law was aimed at preserving competition and not to protect any identifiable group; that company-owned

> and operated stations produced detrimental effects upon the retail market of petroleum products.
>
> "The evidence did not support these statements. The court finds from all the evidence produced before it that the shortage was actual and beyond the control of the legislature of the State or of the Congress of the United States and was directly related to the OPEC embargo. Defendants' witness, Dr. Patterson, admitted that even he was of the opinion that the scope of the law was overly broad. Apart from restraining free competition, it was shown that divestiture would be harmful to competition in the industry, and would primarily serve to protect the independent dealers rather than the public at large. There was no proven detrimental effect upon the retail market caused by company-owned-and operated stations which could not be curbed by federal and state anti-trust laws." (E. 242-43.)

We have in our Commerce Clause argument set forth in detail the evidence which supports this finding by the trial court and establishes there was no evil crying out for cure.

B. THE STATUTE DOES NOT BENEFIT THE PUBLIC GENERALLY BUT RATHER A PARTICULAR GROUP OF BUSINESSMEN

The trial court found:

> "there is no concrete evidence that the act was justified as to the classes of operators singled out to be affected in order to promote the general welfare of the citizens of the State. Rather, it is apparent that the entire bill is designed to benefit one class of merchants to the detriment of another." (E. 244.)

The trial court further found that the law was inversely related to the public welfare. (E. 244.)

As shown under our Commerce Clause argument the evidence established that the law would reduce competition and benefit one class, the independent dealers. This is crass special interest legislation and therefore an abuse of the state's police powers.

C. THE MEANS ARE UNREASONABLY IRRATIONAL AND UNNECESSARY FOR THE ACCOMPLISHMENT OF THE PURPOSE

The Attorney General claimed that the divestiture law was necessary to restore and maintain free competition and prevent detrimental effects upon retail marketing resulting from operation of stations by companies that were also producers and refiners.

The trial court found:

> "Retail petroleum marketing in the State of Maryland is and has been a highly competitive industry." (E. 221.)

The evidence set forth previously establishes that the law will in fact decrease competition and increase prices.

More specifically, as already shown, numerous federal and state laws presently exist which are far better designed to correct any problems. But, more important, these laws achieve that end in a rational manner. This law does not.

D. THE MEANS ARE UNDULY OPPRESSIVE UPON INDIVIDUALS

Finally the question is what loss will the affected companies suffer as a result of the divestiture legislation?

The trial court found:

> "Turning the Lawton's other tests—that the means employed must be reasonable, not unduly oppressive or beyond the necessities of the case—it will be observed that the means of carrying the law into effect as to the producer-refiners would have necessitated that on or before July 5, 1975 some 229 outlets amounting in value to over $12,800,000.00 would have to have been divested, unless the Comptroller were to be convinced of the merits of extending the divestiture period. There was no suggested way in which those affected could obtain a fair market price in arms-length transactions when the potential purchasers were well aware of the exigencies of the occasion. The result would amount to forced sales or leases on a buyers' market, with scant chance of obtaining a fair return on investments made in Maryland in good faith by the entities affected.
>
> "This court has been referred to no situation short of the Prohibition Era where any group of retailers engaged in lawful mercantile activity have been compelled to divest without at least an appreciable period designed to afford amortization of the assets affected by the order. It finds the means unduly oppressive and beyond the necessities of the case." (E. 244.)

Divestiture is an extreme measure. Its disruptive impact on the retail and wholesale market, refining and investment has already been set forth in detail. The losses to the companies affected are so great as to be confiscatory. The artificial rigidity on business is absolutely unprecedented and unjustified. In total

the loss is great; the benefit to the public non-existent.

The Maryland divestiture legislation, under the guise of protecting the public interest, arbitrarily interferes with a legitimate private business and imposes unusual and unnecessary restraints upon lawful occupations. It is therefore an unlawful exercise of the state's powers.

CONCLUSION

As the Maryland divestiture law violates the Commerce Clause of the United States Constitution and is an unauthorized exercise of the police powers of the state, it is respectfully requested that this Court note probable jurisdiction and find this law to be unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-10

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY PACIFIC LEGAL FOUNDATION

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Respondents, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of Maryland and Louis L. Goldstein, Comptroller of the Treasury, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General and John A. Woodstock, Assistant Attorney General hereby file objection to the motion by Pacific Legal Foundation, for leave to file a brief *amicus curiae* in support of Appellant's jurisdictional statement. Respondents' objection is based on the following grounds:

1. The interest of Pacific Legal Foundation (hereinafter referred to as "petitioner"), as disclosed in its

motion, is no more than a remote interest in the issues involved in this case.

2. The principal issues which petitioner seeks to discuss in its brief *amicus curiae* are already presented to this Court by six (6) appellants who have docketed appeals and Jurisdictional Statements.[1] Thus, to the extent that petitioner's interest may be pertinent to the particular issues in which it is interested, its argument, at best, is duplicative and redundant to the treatment and representation of these issues by the appellants. For respondents to be put in the position of having to respond to this petitioner's arguments on these issues would unnecessarily cause further pleadings to be enlarged and would be likely to distract both counsel and the Court from the other issues involved.

3. It is submitted that petitioner's motion does not demonstrate any factual or legal issues that have not and will not be comprehensively represented by the appellants in this proceeding, all of which have, and are represented by, an abundance of counsel who have consistently demonstrated exceptional expertise in their treatment of the issues involved in this case. Under all the circumstances, petitioner has failed to demonstrate that its participation would in any manner be necessary to, or enhance, the eventual disposition of this case.

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[1] In addition to the appeal and Jurisdictional Statement by Exxon Corporation and Phillips Petroleum Company, No. 77-10 (7/1/77), *see: Shell Oil Company v. Governor of the State of Maryland, et al., appeal docketed,* No. 77-11 (Sup. Ct. July 1, 1977); *Continental Oil Company, et al. v. Governor of Maryland, et al., appeal docketed,* No. 77-12 (Sup. Ct. July 1, 1977); *Gulf Oil Corporation v. Governor of Maryland, et al., appeal docketed,* No. 77-47 (Sup. Ct. July 8, 1977); *Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc. and Petroleum Marketing Corporation v. Governor of Maryland, et al., appeal docketed,* No. 77-64 (Sup. Ct. July 11, 1977).

For each and all the foregoing reasons, Pacific Legal Foundation's motion should be denied.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

BRIEF OF AMICI CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

FILED ON BEHALF OF CHAMPLIN PETROLEUM COMPANY, CITIES SERVICE OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, KERR-McGEE CORPORATION, KOCH REFINING COMPANY, MARATHON OIL COMPANY, THE STANDARD OIL COMPANY (OF OHIO), SUNMARK INDUSTRIES, A DIVISION OF SUN OIL COMPANY OF PENNSYLVANIA, TENNECO OIL COMPANY AND TESORO PETROLEUM CORPORATION.

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MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

Champlin Petroleum Company, Cities Service Oil Company, Getty Refining and Marketing Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, The Standard Oil Company (of Ohio), Sunmark Industries, A Division of Sun Oil Company of Pennsylvania, Tenneco Oil Company and Tesoro Petroleum Corporation ("the amici group") hereby move, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief as *amici curiae*. The appellants have consented to the filing of such a brief. The appellee, through the Attor-

ney General of the State of Maryland, has refused consent.

As more fully set forth in the brief (*infra,* pp. 2-6), current and future business operations of each member of the amici group are directly, substantially and adversely affected by the decision of the court below. That decision will force many members of the group to divest themselves of existing company-operated retail service station outlets for their petroleum products, and will prevent them from opening such new outlets.[1]

Unlike appellants, some members of the amici group do not now market petroleum products in Maryland.[2] One member of the amici group, Koch Refining Company, has only company-operated retail outlets in other states, and has never had any dealer-operated retail outlets. These members of the amici group are effectively precluded from entering the Maryland retail market because the Maryland statute at issue in

[1] Members of the amici group which market petroleum products in Maryland through company-operated retail service stations and which would be subject to the divestiture provisions of the Maryland statute include: Cities Service Oil Company, Getty Refining and Marketing Company, The Standard Oil Company (of Ohio) (through a subsidiary, BP Oil Inc.), and Sunmark Industries, A Division of Sun Oil of Pennsylvania.

Tenneco Oil Company sells to 61 wholesale customers in Maryland, but has no retail outlets at all in Maryland. Thus, Tenneco would not be subject to the divestiture provisions of the Maryland statute, but its ability to sell to wholesalers in Maryland might be affected by the uniform allocation and pricing provisions of the statute, which apply to the wholesalers to whom Tenneco sells petroleum products.

[2] Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (one outlet of a subsidiary is operated under an exclusive contract with Memco Stores).

this case prohibits company-operated service stations, which are the only effective means of competition in a field dominated by brand names and established consumer loyalties. Thus, members of the amici group can present a different perspective from appellants on the effect of the Maryland statute on interstate commerce in petroleum products, because they, unlike appellants, will be precluded from entering the Maryland retail market.

The Maryland statute at issue in this case presents important questions in regard to the degree to which it has been, or should be, pre-empted by the Commerce Clause, U.S. Constit. Art. I, § 8, cl. 3, and by the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b). An additional ground for pre-emption of the Maryland statute is presented by the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* In view of the national importance of assuring a steady, fairly and fully apportioned supply of petroleum products, the amici group believes that this latter question (discussed in the brief, *infra,* pp. 18-26) should be—and has not been—fully presented to this Court.

The full range of questions presented by this case are of great significance because they have potential to change fundamental principles of law in regard to the Commerce Clause, the federal Emergency Petroleum Allocation Act and the Robinson-Patman Price Discrimination Act. The resolution of these questions will not only affect these important areas of federal law, but will also have direct and important consequences for existing or contemplated legislation in some thirty-four states other than Maryland. Therefore, this Court

should be presented with a diverse, comprehensive discussion of the ramifications of these important questions.

For these reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (App. A, pp. 1a-44a)[1] is officially reported at 279 Md.

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[1] References to appendices are to those contained in the joint

410, and also at 370 A.2d 1102. A supplemental opinion of the Court of Appeals on motions for reconsideration and stay of judgment is officially reported at 279 Md. 456. (App. B, pp. 45a-48a.) The opinion of the Circuit Court, Anne Arundel County (App. C, pp. 49a-51a) granting motions for partial judgment is not officially reported, but is unofficially reported at 1976-1 Trade Cases (CCH), ¶ 60,704 (Md. Cir. Ct., 1975). The opinion of the Circuit Court on the remaining issues (App. D, pp. 53a-134a) is not officially reported.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered April 13, 1977. A petition for reconsideration and for stay of the mandate was denied by that court on April 13, 1977. (App. B, pp. 45a-48a.) Notices of appeal were timely filed with the clerk of the Maryland Court of Appeals and with the clerk of the Circuit Court for Anne Arundel County, the court possessed of the record, pursuant to Rule 877 of the Maryland Rules of Procedure, Md. Ann. Code (1957) (1977 Repl. Vol.), and are reprinted in App. E, pp. 135a-154a. The Exxon Corporation and Phillips Petroleum Company filed a Jurisdictional Statement on July 1, 1977. Jurisdiction is invoked under 28 U.S.C. § 1257(2).

INTEREST OF AMICI CURIAE

Amici curiae are a group of petroleum companies, consisting of Champlin Petroleum Company, Cities

Appendix filed by Exxon Corporation, the Phillips Petroleum Company, Gulf Oil Corporation, Continental Oil Company and its subsidiary, Kayo Oil Company, Shell Oil Company, Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation accompanying their jurisdictional statements.

Service Oil Company, Getty Refining and Marketing Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, The Standard Oil Company (of Ohio), Sunmark Industries, A Division of Sun Oil Company of Pennsylvania, Tenneco Oil Company and Tesoro Petroleum Corporation. Some members of the *amici curiae* group are engaged in petroleum production, refining and marketing;[2] others are engaged only in petroleum refining and marketing.[3]

None of the members of the amici group is engaged in petroleum production or refining in Maryland.[4] Some of the amici group were, and are, engaged in marketing petroleum products in Maryland through retail service

[2] Champlin Petroleum Company (wholesale marketing in the southwest, southeast and eastern seaboard, retail marketing in the mid-continental states); Cities Service Oil Company (marketing in twenty-seven states); Kerr-McGee Corporation (marketing primarily in the midwest and southwest); Marathon Oil Company (wholesale marketing in the eastern states, retail marketing in six midwestern states); The Standard Oil Company (of Ohio) (marketing either directly or through subsidiaries in Ohio, Pennsylvania, Michigan, Kentucky, West Virginia, Indiana, New England and the Mid-Atlantic regions); Tenneco Oil Company (marketing primarily in the southeastern and Atlantic seaboard areas); Tesoro Petroleum Corporation (marketing in California, Connecticut, New Jersey, New York and Pennsylvania).

[3] Getty Refining and Marketing Company (marketing in twelve northeastern states under the "Getty" brand name and in the midwest under the "Skelly" brand name). Getty Oil Company, the parent of Getty Refining and Marketing Company, also engages in petroleum production. Koch Refining Company (marketing in 36 states through a subsidiary, Koch Marketing Company). Koch Industries, Inc., a parent company, also engages in petroleum production. Sunmark Industries, A Division of Sun Oil Company of Pennsylvania (marketing in the eastern two-thirds of the United States). Sun Oil Company of Pennsylvania engages in petroleum refining; a related company engages in petroleum production.

[4] There is not now, and never has been, any petroleum production or refining in Maryland. (App. A, p. 19a.)

stations.[5] Some of the amici group are not now engaged in retail marketing of petroleum products in Maryland.[6]

The Maryland statute[7] upheld by the court below directly affects each member of the amici group. That statute, *inter alia,* prohibits petroleum producers, refiners and wholesalers from opening or continuing to operate retail service stations operated with company personnel.

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[5] Members of the amici group currently marketing petroleum products in Maryland through retail service stations include:

Cities Service Oil Company: 60 retail service stations—34 company operated, 26 dealer operated.

Getty Refining and Marketing Company: 92 retail service stations—all dealer operated as of May 15, 1977.

The Standard Oil Company (of Ohio): BP Oil Inc., a subsidiary, has 72 retail service stations, 61 of which are company-operated, 11 of which are dealer operated. BP Oil Inc. also sells to 32 wholeale distributors, and 20 other retailers.

Sunmark Industries, A Division of Sun Oil of Pennsylvania: 264 retail service stations, 9 of which are company-operated, 255 of which are dealer operated. Sunmark expanded the number of company-operated stations in 1975-1976.

Tenneco Oil Company does not now have any retail service station outlets nor any branded operations in Maryland. Tenneco does sell petroleum products to 61 wholesalers in Maryland.

See also Pre-Trial Order, Circuit Court for Anne Arundel County, October, 1975, Tables A and B, at pp. 11-13 for 1974 data on petroleum marketing in Maryland.

[6] Companies which do not presently market petroleum products in Maryland include: Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (a subsidiary, Digas Company, operates one retail outlet in Baltimore under an exclusive contract with Memco Stores).

[7] Md. Ann. Code, Art. 56, § 157E (1972 Repl. Vol. 1976 Cum. Supp.), set forth at p. 3 of the Jurisdictional Statement.

Those companies in the amici group which are petroleum producers and refiners and do not presently market their products in Maryland[8] will be unable to enter and compete in the Maryland market because the Maryland statute forbids the opening of company-operated retail service stations, which are the most efficient, economic and competitive avenues for initial and continuing participation in the highly competitive petroleum products and gasoline retail field. Those companies which are petroleum producers and refiners and do presently market petroleum products in Maryland are prohibited from opening any new company-operated retail service stations and must divest existing company-operated retail service stations. No company can maintain or develop company-operated service stations as retail outlets to market petroleum products in Maryland as long as it also has a production or refining capacity.

The Maryland statute upheld by the court below also requires any company in the amici group which enters or remains in the Maryland petroleum retail market to allocate petroleum products uniformly to all retail service station dealers. Yet, Congress has established its own broad plan for allocating petroleum resources, the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* The Maryland statute also requires any company in the amici group which enters or remains in the Maryland petroleum retail market to grant any voluntary price allowances uniformly to all retail service station dealers throughout the state. Yet, the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b), permits price differentiations to be ex-

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[8] *See* n. 6, *supra.*

tended on a non-uniform and geographically limited basis. Thus, the Maryland statute imposes on the members of the amici group new or different requirements for doing business than those imposed by these two important federal statutes.

The Maryland statute upheld by the court below thus affects the scope, content, distribution method and pricing of the present and future busines operations in Maryland of all the members of the *amici curiae* group. Other states have adopted or are considering similar legislation. Thus, the decision of the court below could, because of its potential precedential value, have impact on the conduct of the business of the amici group in at least thirty-four jurisdictions other than Maryland. For these reasons, this brief is being filed to urge this Court to review the decision below.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the Maryland Court of Appeals, upholding a state law[9] prohibiting producers and refiners of petroleum products from opening or operating retail service stations in the State of Maryland operated by company personnel, and imposing restrictions on the distribution of petroleum to retail service station dealers,[10] presents novel and important questions which warrant review by this Court.[11]

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[9] Md. Ann. Code, Art. 56, § 157E (1972 Repl. Vol. 1976 Cum. Supp.).

[10] The statute requires every producer, refiner or wholesaler of petroleum products to extend all voluntary allowances uniformly, to supply all equipment rentals uniformly, and to distribute all gasoline and special fuels uniformly and on an equitable basis during periods of shortage to all retail service station dealers.

[11] The Maryland statute was challenged in the Circuit Court for Anne Arundel County on the basis of its repugnancy to the federal constitution, and that court held the statute unconstitutional. The Maryland Court of Appeals, the highest court of Maryland, after a challenge to the Maryland statute based on eight federal constitutional grounds (App. A, p. 4a-5a), held the statute in its entirety to be constitutional, and thus decided in favor of the validity of the statute. Consequently, the case falls within the jurisdictional statute. 28 U.S.C. § 1257(2).

Producers and refiners distribute petroleum products to the consuming public through both company-operated and independently run retail service stations. The Maryland Court of Appeals has upheld a state statute which eliminates one of these distribution methods, the company-operated retail service station. This decision will alter radically the structure of the petroleum industry, which has, until now, depended on both avenues of distribution.

The importance of the questions raised is magnified by the enactment of similar statutes in several states[12] and the extensive consideration being given related measures in 31 state legislatures.[13] If the decision below

[12] Delaware and the District of Columbia have adopted statutes which prohibit petroleum producers or refiners from operating retail stations and require prices and allowances to be uniform. Del. Code tit. 6, § 2905 (Cum. Supp. 1976); D.C. Law 1-123 (April 7, 1977). The Delaware statute is presently being challenged in the state courts. Florida enacted a law limiting the percentage of retail stations which could be company operated. Fla. Stat. Ann. § 526.151 (Supp. 1976) (held unconstitutional under the Florida Constitution in *Exxon Corp.* v. *Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Florida, January 23, 1975)). California and Rhode Island have adopted statutes which require price allowances to be uniform. Cal. Bus. & Prof. Code § 21200 (Deering) (held unconstitutional under the federal constitution in *Shell Oil Co.* v. *Younger*, 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed*, No. 76-2784 (9th Cir. Aug. 13, 1976); Rhode Island, R.I. Gen. Laws § 5-55-5 (Supp. 1976).

[13] Legislatures in the following states have been or are considering

is permitted to stand without review by this Court, it will serve as a precedent which will encourage the States to devise their own regulatory schemes restructuring the petroleum industry. Such regulatory schemes may vary from state to state, which will compound the likely serious disruption of interstate commerce in the petroleum commodities vital to the national economy. The interdependent economic complexities of this industry and the national interest in maintaining a reliable and efficient petroleum products supply system require that a decision of a state court sustaining such a novel and far-reaching reorganization of this industry, and the methods by which petroleum products are distributed, not be permitted to stand without plenary review by this Court.

The questions here presented are also substantial because the Maryland statute and decision below expand state power to regulate interstate commerce far beyond the limits previously established by this Court. Maryland has determined that the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, does not prevent a state from completely excluding company-operated retail outlets of interstate producers or refiners of petroleum products from the retail market within its borders. But, as this Court has recently said, "the Clause is a limit on state power. Defining that limit has been the continuing task of this Court." *Boston Stock Ex-*

related measures: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. California and Rhode Island, which have adopted statutes which require uniform price allowances, *see* n.12, *supra*, also have been considering legislation which requires divestiture of company-operated retail service stations.

change v. *State Tax Commission*, decided January 12, 1977. Whether a state may constitutionally so regulate, burden, and discriminate against interstate commerce in petroleum products should now be decided by this Court.

Plenary review of the decision below would ensure that such significant changes in the way in which interstate commerce in the petroleum industry is conducted are not decided on a state-by-state but rather on a national basis. The Commerce Clause of the United States Constitution gives to Congress the basic power to make laws "To regulate Commerce . . . among the several States. . . ." The Maryland statute requires interstate petroleum producers and refiners to distribute their products in a certain way in the State of Maryland: only through independent, retail service stations, with uniform voluntary allowances, uniform equipment rentals, and uniform apportionment of gasoline to Maryland retail dealers. Such legislation, which burdens and discriminates against interstate commerce, and which creates diversity instead of uniformity, conflicts with the power to regulate interstate commerce granted to the Congress.[14] "[W]here Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).

The Maryland statute at issue in this case also conflicts with two specific federal statutes: the Emergency

[14] The Congress is now considering whether petroleum industry restructuring should be compelled. *See, e.g.*, S. 795, 95th Cong., 1st Sess., 123 Cong. Rec. S2974 (daily ed. Feb. 24, 1977); H.R. 3370, 95th Cong., 1st Sess., 123 Cong. Rec. H1074 (daily ed. Feb. 9, 1977); 9 Nat'l J. 170-173 (1977).

Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.*, and the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b).

The federal Emergency Petroleum Allocation Act establishes a comprehensive and complex federal program to regulate the allocation of petroleum products. Paragraph F of the Maryland statute requires the uniform apportionment of petroleum products to all retail service station dealers during times of shortage. It thus intrudes upon the area regulated by the federal statute, and conflicts with it.

The court below, however, concluded that there was no conflict, and thus, that there was no pre-emption of the Maryland statute. Although all pre-emption problems require a careful weighing of respective federal and state interests, this need is even greater where the statutes respond to such a pressing national problem as the availability of scarce petroleum products. The determination of the court below that pre-emption is not operative here flies in the face of the express language of the Emergency Petroleum Allocation Act, § 755(b), and contravenes the policy expressed by Congress in that Act. Review by this Court is required, for, otherwise, the decision below would stand as a precedent which would encourage each state to impose its own restrictions on the distribution of petroleum products. Each state would be free to make its own balance of federal and state interests. Such action could seriously impair the effectiveness of the Emergency Petroleum Allocation Act.

The Maryland statute likewise conflicts in Paragraph D with Section 2(b) of the Robinson-Patman Act. That federal act permits the lowering of prices to meet

prices set by competitors. The Maryland statute requires petroleum producers and refiners to extend voluntary allowances on a uniform basis. It thus deprives petroleum refiners and producers of the absolute right, granted by Section 2(b) of the Robinson-Patman Act, to make a good faith discrimination in price between purchasers where necessary to meet equally low prices set by competitors.

In order to legitimize the Maryland statute, the court below selected between conflicting lower federal court decisions to hold that the Section 2(b) "meeting competition" defense was available to a supplier only when the discriminatory price is offered to a buyer in response to an equally low price offered to that same buyer by a competitor of the supplier. Relying on this interpretation of Section 2(b), the court below concluded that the Maryland statute did not conflict with —and was not pre-empted by—the Robinson-Patman Act, because the Section 2(b) defense was not applicable in the circumstance regulated by the Maryland statutes.

Resolution of the important question of the circumstances in which the Section 2(b) defense is available should not be made by a state court selecting between two competing interpretations by lower federal courts and in a manner contrary to the views of the two administrative agencies charged with enforcement of the statute. Rather, this important question, which this Court has specifically left open, *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 512, n.7 (1963), should be resolved only by plenary review by this Court.

These questions are developed more fully in the remaining portion of this brief.

I.

THE MARYLAND STATUTE IS INVALID UNDER THE COMMERCE CLAUSE

Paragraphs B and C of the Maryland statute prohibit refiners or producers of petroleum products from operating retail service outlets. Because there is no refining or producing of petroleum products in Maryland (App. A, p. 19a), the statute creates a protectionist barrier insulating local retail service station dealers from competition with company-operated retail stations of interstate producers or refiners.

The court below determined that the Commerce Clause was no bar to this state action. It concluded that the statute was not discriminatory, and found a legitimate local interest in the expressed purpose of the statute "to preserve competition within the retail gasoline marketing industry in Maryland" (App. A, p. 19a) which, in its view, outweighed any potential burden on interstate commerce. Yet (1) the statute clearly discriminates against interstate petroleum producers and refiners who market petroleum through company-operated retail outlets, (2) it substantially burdens interstate commerce, (3) any legitimate local interest is outweighed by the national interest in an unimpeded interstate market for petroleum products and in uniform regulation of the petroleum supply system, and (4) less restrictive alternatives are available to the State. So far-reaching a challenge as that posed by the Maryland statute and the decision below to the historic scope of the Commerce Clause and the national economy it has nurtured and sustained should not be allowed to stand without full review by this Court.

A. The End To Which The Maryland Statute Is Aimed Is Invalid Under The Commerce Clause.

The Maryland statute discriminates against interstate commerce by excluding interstate petroleum producers and refiners from the Maryland retail service station market. At least since *Cooley* v. *Board of Wardens,* 12 Howard 299 (1851), it has been clear that the Commerce Clause was not only a grant of authority to the Congress but "by its own force created an area of trade free from interference by the States." *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946); *Great Atlantic & Pacific Tea Co.* v. *Cottrell.* 424 U.S. 366, 370-371 (1976). Although the States are not precluded from protecting their citizens in matters of legitimate local concern even where interstate commerce is affected, the Commerce Clause "forbids discrimination" against interstate commerce "whether forthright or ingenious." *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455 (1940). *See South Carolina State Hwy. Dept.* v. *Barnwell Bros.,* 303 U.S. 177, 185 (1938); *H.P. Hood & Sons* v. *Du-Mond,* 336 U.S. 525, 535 (1949).

This Court is not bound by the expressed purpose of the state legislation in its determination of the legitimacy of the local interest served by the statute. *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 354 (1951). The real purpose of the Act was stated succinctly by the trial court upon review of all the evidence: "the entire bill is designed to benefit one class of merchants to the detriment of another." (App. D, p. 131a.) [15] This

[15] Gasoline marketing divestiture legislation has been promoted in the States primarily by independent retail gasoline dealers' associations. Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment,* 28 Vand. L. Rev. 1277, 1279, 1307 (1975).

Court has never held legitimate the protection of a State's own citizens, in this case Maryland's independent retail service station dealers, from the "burden of economic competition with the citizens of other States," *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 821 (1976) (Brennan, J., dissenting), here, the company-operated retail outlets of interstate petroleum producers and refiners.[16] Any other rule "would invite a multiplication of preferential trade areas destructive" of the free trade and unified national economy which the Commerce Clause protects. *Dean Milk Co.* v. *Madison, supra,* 340 U.S. at 356. This is exactly what the Maryland statute has established.

Nor can even its expressed purpose sustain the Maryland statute when it conflicts with the Commerce Clause. No State may strike out on its own to slay the dragon of "big oil" with the sword of divestiture. A viable national economy depends too heavily on its petroleum supply system to permit fragmented state-by-state redesign of the petroleum distribution system. If problems of competition in the petroleum industry require industry restructuring, the task "may justly be said to be of such a nature as to require exclusive legislation by Congress."[17] *Cooley* v. *Board of Wardens, supra,* 53 Howard at 319. *See Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346, 351 (1939).

[16] *See Dean Milk Co.* v. *Madison, supra,* 340 U.S. at 354, where this Court held that "an economic barrier protecting a major local industry against competition from without the State" is prohibited by the Commerce Clause.

[17] The necessity for *national* responses to problems of petroleum industry competition has been recognized by the Senate Committee on the Judiciary. In a recent report, the Committee recognized the national interest in the structure and marketing operations of the petroleum industry, noting that vertical divestiture proposals raised fundamental social questions which "'must be resolved either by Congress or the judicial system.'" S. Rep. No. 94-1005, 94th Cong., 2d Sess. 3, 6 (1976). The Committee said also that "the Nation has a vital stake in the conditions under which the outputs of the petroleum industry go to market." *Id.* at 3.

B. Maryland's Regulatory Approach Is Not Reasonably Adapted To Its Putative End—The Substantial Burden On Interstate Commerce Imposed By The Maryland Statute Outweighs Any Local Benefits. And Less Restrictive Alternatives Are Available.

Even if the Maryland statute were aimed at the legitimate end of preserving retail gasoline marketing competition, as the court below concluded, the approach taken in the Maryland statute is not appropriate to this end. Although this Court normally will leave to the legislative body questions of the "reasonableness, wisdom and propriety" of a regulatory scheme, *South Carolina Hwy. Dept.* v. *Barnwell Bros., supra,* 303 U.S. at 191, where interstate commerce is affected, it must be satisfied that the "means of regulation chosen are reasonably adapted to the end sought." *Id.* at 190. *See Milk Control Board* v. *Eisenberg Farm Products, supra,* 306 U.S. at 352. The record indicates that the statute is, for example, anticompetitive in its exclusion of independent refiner-marketers (App. A, p. 15a), and will adversely affect price competition. (App. D, p. 130a.)[18]

The decision below also demands review by this Court because it upholds a statute which appears to

[18] The Maryland trial court found that not only was there "not . . . demonstrated a real and substantial relation to the object sought to be attained by the means selected," but that in reality "the evidence . . . . indicates that the statute is inversely related to the public welfare." (App. D, p. 131a-132a.)

contravene this Court's prohibition against the imposition of undue burdens on interstate commerce by state legislatures. The Maryland statute will directly affect the interstate flow not only of petroleum products but also of capital, even though the court below concluded that the "Act merely regulates a wholly intrastate activity." (App. A, p. 18a.) Some interstate petroleum producers and refiners will ship less gasoline into Maryland if they are not permitted to use company-operated retail outlets. Some interstate petroleum producers and refiners will invest less capital in Maryland if these profitable enterprises are prohibited. Outside capital may also be harder (and more expensive) to obtain if profitable marketing outlets of interstate suppliers are curtailed. Oil companies not presently engaged in Maryland activities will be discouraged from entering the Maryland market if they cannot operate the economically attractive retail outlets which are essential to their ability to compete in that market. Partially integrated private brand marketers may have to withdraw from the Maryland market. Private brand marketers may be unable to "backward integrate" to create a competitive producing or refining capacity. This is hardly the "slight burden" on interstate commerce found acceptable by the court below. (App. A, p. 24a.)

This disruption of interstate commerce will be compounded if other states are encouraged by Maryland's successful exercise of the new-found power over the distribution system for petroleum products. Until now, the states have not been permitted by this Court to impose such substantial burdens on the national commerce in the absence of countervailing local requirements.

Great Atlantic & Pacific Tea Co. v. *Cottrell, supra,* 424 U.S. at 373; *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

Even if it were found that the Maryland statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it cannot be upheld because "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142. *See Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1960). Determining the extent of the burden on interstate commerce that will be tolerated requires this Court to balance Maryland's interest against "the overiding requirement of freedom for the national commerce," *Freeman* v. *Hewit, supra,* 329 U.S. at 253, with " 'the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities.' *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)." *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* 424 U.S. at 372 (footnote omitted).[19]

Here, as in *Dean Milk Co.* v. *Madison, supra,* 340 U.S. at 354, the local interest could be served as well by the use of alternatives less burdensome to interstate commerce, a factor entirely ignored by the court below. The Maryland legislature's concern that vertically integrated oil companies will favor their company-operated retail outlets in time of shortage should

[19] Less weight is given to the local interest in the balancing process when that interest is purely economic in nature than when it is related to health and safety. *See H. P. Hood & Sons* v. *Dumond, supra,* 336 U.S. at 533.

be obviated by operation of the federal Emergency Petroleum Allocation Act [20] and its penal sanctions.[21] Federal and Maryland antitrust laws make criminal sanctions available to the state as well as equitable and civil remedies to protect against anticompetitive activities. The Maryland Gasoline Products Marketing Act, Md. Com. Law Code Ann. § 11-304(c), (App. F, pp. 155a-161a), further protects against arbitrary termination of dealer operations. If these measures are not adequate, the legislature could fashion less draconian remedies which do not so substantially burden and disrupt interstate commerce.[22]

II.

PARAGRAPH F OF THE MARYLAND STATUTE IS INCONSISTENT WITH, AND THEREFORE PRE-EMPTED BY, THE FEDERAL EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, BY VIRTUE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.[23]

Congress has established a nationwide program for the allocation of scarce petroleum supplies. Whether this comprehensive federal petroleum allocation program pre-empts state legislation is a question that

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[20] 15 U.S.C. § 751-760 (Supp. V 1975).

[21] *Id.* at § 754.

[22] *See, e.g.*, Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 Vand. L. Rev. 1277, 1331-1334 (1975) (proposed predatory pricing amendment).

[23] U.S. Const. Art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

should be resolved by plenary review by this Court of the decision below.

In the fall of 1973, shortages of all types of petroleum products created severe domestic and international difficulties. After thorough deliberation, Congress determined that the problems caused by the oil shortage "jeopardize the *normal flow of commerce* and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government." 15 U.S.C. § 751(a)(3) (emphasis added). Accordingly, Congress adopted the Emergency Petroleum Allocation Act of 1973 ("EPAA"),[24] which required the President to develop, in accordance with guidelines established by Congress, a comprehensive program to regulate the allocation of petroleum during times of shortage.[25]

Thereafter, Maryland passed the present statute which also deals with the allocation of petroleum-based fuel. It provides:

> "Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments." Md. Ann. Code, Art. 56, § 157E(F).

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[24] Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751-760). In 1975, the life of the EPAA was extended to 1981 by the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871.

[25] The regulations have been adopted, and may be found in 10 C.F.R. § 211.1-§ 211.225.

Although the Maryland statute deals with precisely the same subject matter that is comprehensively treated by the federal act and regulations, the Maryland Court of Appeals held that the Maryland statute did not necessarily conflict with any specific federal regulation, and thus that it was not pre-empted by virtue of the Supremacy Clause of the United States Constitution. (App. A, pp. 31a-32a.) This decision, which permits a state to enter an area of great national importance, and one that has been so thoroughly regulated by the federal government, should not be permitted to stand without the full consideration of this Court.

The approach of the Maryland Court of Appeals to the problem of pre-emption incorrectly resolves the difficulties posed when federal and state laws regulate the same subject. The Maryland Court considered only the question whether there was direct conflict between the state statute and the federal regulations. This Court has stated, however, that federal law may pre-empt state legislation even where there is no specific conflict. *Campbell* v. *Hussey,* 368 U.S. 297, 300 (1961). In a pre-emption case, a court's "primary function is to determine whether, under the circumstances of [a] particular case, [a state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941) (footnote omitted).

A. Congress Has Occupied The Field.

The present case is a ready example of this Court's observation that "it is where there is in existence a pervasive and comprehensive scheme of federal regulation that pre-emption follows in order to fulfill the

federal statutory purposes." *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 139 (1973). The EPAA and the regulations issued under it clearly occupy the entire area relating to the allocation of petroleum products. The regulations comprehensively regulate all aspects of the allocation of all forms of petroleum, 10 C.F.R. §§ 211.1-211.225, and explicitly cover the allocation of petroleum products to retail service station dealers. 10 C.F.R. § 211.106. Thus, the federal law expressly deals with the area covered by the state law.

The federal allocation program is the result of a complex balancing of competing political, economic, social and regional interests. The EPAA required the President in establishing the allocation program, to accommodate "to the maximum extent practicable," nine important objectives. 15 U.S.C. § 753(b)(1).[26]

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[26] As described by the House Committee, "Subsection (b) requires that to the extent practicable the regulation under subsection (a) provide for protection of public health, safety, and welfare, and the national defense; maintenance of all public services; maintenance of agricultural operations; preservation of an economically sound and competitive petroleum industry (including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, nonbranded independent marketers, and branded independent marketers); equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry (including independent refiners, nonbranded independent marketers, branded independent marketers), and among all classes of users; economic efficiency; and minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." H.R. Rep. No. 531, 93d Cong., 1st Sess. 17 (1973). The conference committee added to the final bill the additional objectives of allocation of crude oil to refineries

The conference committee recognized, however, "that, in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another. . . . This qualification is intended to give the President administrative flexibility in marshalling short supplies and equitably assigning them to particular needs." H.R. Rep. No. 628, 93d Cong., 1st Sess. 12 (1973).

The complex and finely-tuned nature of the federal allocation program has been recognized by the courts. In *Air Transport Association of America* v. *FEO,* 520 F.2d 1339, 1342 (Em. Ct. App. 1975), the Temporary Emergency Court of Appeals held that the section "dealing with equitable distribution of crude oil at equitable prices was only one of nine separate objectives which Congress directed that the regulations should provide, and that the balancing of all objectives is required 'to effectuate maximum achievement of their competing interests.' " Likewise, in *Condor Operating Co.* v. *Sawhill,* 514 F.2d 351, 359 (Em. Ct. App.), *cert. denied,* 421 U.S. 976 (1975), the court stated that "Exercising of the administrative authority and the accomplishment of purposes enumerated by Congress under the recognized emergency conditions are exceedingly complicated undertakings."

The broad and complex nature of the regulations issued pursuant to the EPAA strongly suggests that any effort by a state to duplicate or supplement the national allocation effort will inevitably conflict with the federal program. Regardless of how careful the state might be to avoid interference, the intricate na-

to permit full operation and allocation of petroleum products to permit further exploration for fuel. H.R. Rep. No. 628, 93d Cong., 1st Sess. 24 (1973).

ture of the regulatory scheme and the necessity to balance competing national objectives and competing private interests precludes dual regulation. Since a state cannot anticipate the balance between the competing factors that the federal government might make in its enforcement efforts, whatever action the state could take to enforce Paragraph F would have a disruptive impact on the administration of the federal plan.

The EPAA is an instance where a federal act "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . ." *Rice* v. *Sante Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). The House Committee reported the bill with the assertion that "the basis and need for *Federal intervention* in the market to order mandatory allocation of certain fuels is well established." H.R. Rep. No. 531, 93d Cong., 1st Sess. 6 (1975) (emphasis added). Petroleum shortages are a nationwide problem that can be avoided or ameliorated only on a national basis. The choice of a method to allocate this scarce resource is permeated with policy considerations of both national and international importance. The federal regulations issued pursuant to the EPAA do establish a limited but significant role for the States to play in the allocation process. 10 C.F.R. § 211.15, § 211.17.[27] Since the regulations specifically define the state role, no other role appears to be contemplated.

[27] Section 211.15 provides for the establishment of state offices of petroleum allocation. Section 211.17 creates a state "set-aside" system to "be utilized by the State office to meet hardship and emergency requirements of all wholesale purchaser-consumers and end-users within that state from the state set-aside volumes . . ."

B. The Maryland Court of Appeals Incorrectly Determined That The Maryland Statute Was Not Pre-empted By the Federal Emergency Petroleum Allocation Act.

The Maryland Court of Appeals dealt with the problem arising under Paragraph F by relying on 15 U.S.C. § 755(b), which reads as follows:

> The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any state or local government if such provision is in conflict with such regulation or any such order.

The court below held that this provision indicates congressional intent not to pre-empt a state allocation program unless there is an actual conflict between the state statute and a specific federal regulation. (App. A, p. 30a.)

There is no evidence, however, that this provision was designed to narrow in any way the usual scope of federal pre-emption. The language of Section 755(b) itself is phrased in affirmative terms. It states that the Act is intended to be pre-emptive. There are no explicit terms that indicate an intent to permit a state program that would otherwise be precluded. Moreover, the legislative history of the EPAA provides no support for the Maryland court's conclusion. Congress has nowhere indicated that states are to be allowed to pursue their own petroleum allocation programs.

It appears that Section 755(b) was designed solely to emphasize the need for federal supremacy in the complex area of petroleum allocation. The House report stated that the provision was designed to "pre-

empt state allocation *programs* which conflict with the national allocation scheme contemplated in this bill." H.R. Rep. No. 531, 93d Cong., 1st Sess. 6 (1973) (emphasis added). It would be anomalous if this congressional expression of pre-emptive intent were transformed into precisely the opposite.

Even if the state court were correct in its interpretation of the pre-emption clause of the EPAA, it is far from clear that there is no specific conflict between the EPAA and Paragraph F of the Maryland Act. The court below attempted to resolve the apparent differences in the two laws by stating that the Maryland comptroller, who is charged with the administration of the state program, *might* construe the Maryland statute consistently with the federal regulations. The court did not, however, decide that the statute required the comptroller to do so. (App. A, p. 32a.) The statutory mandate of Paragraph F is so broad that the comptroller is left free to take a wide range of actions, any one of which may frustrate the purposes of the federal program.

Even if the regulations issued by the comptroller were consistent with the federal regulations, the federal and state methods of enforcement of the two acts and regulations may differ and create conflicting results. This Court has stated in the labor law context that a "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union,* 346 U.S. 485, 490-491 (1953). As this Court has also said, "Administration is more than a means of regulation; administration is regulation." *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 243 (1959). A dual

system of petroleum allocation administration will inevitably lead to conflicting regulation and thereby frustrate the federal purpose.

The process by which the nation's scarce petroleum resources are allocated is of critical importance to the nation as a whole. If states participate in this process on the basis of their own statutory directives, the coordination and carefully constructed balance of the federal program will be impaired. *Cf. Pennsylvania* v. *Nelson,* 350 U.S. 497, 509 (1956); *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 638-639 (1973). Before the states are permitted to improvise their own role in dealing with this important national problem, this Court should, by plenary review of the decision below, clearly establish the extent to which a state may regulate petroleum allocation when Congress itself has established a plan to do so.

III.

THE MARYLAND COURT OF APPEALS' DETERMINATION OF THE SCOPE OF SECTION 2(b) OF THE ROBINSON-PATMAN ACT AND OF THE COMPATIBILITY OF THAT ACT WITH PARAGRAPH D OF THE MARYLAND STATUTE RAISES IMPORTANT QUESTIONS WHICH WARRANT REVIEW BY THIS COURT.

Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), provides that a seller can rebut a *prima facie* case of unlawful price discrimination among purchasers in violation of Section 2(a) of the Act [28] by

[28] Section 2(a) provides, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." 15 U.S.C. § 13(a).

showing that "his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . ." This Section 2(b) "meeting competition" defense is available and is absolute, irrespective of any adverse effect on competition caused by the price discrimination. *Standard Oil Co.* v. *FTC,* 340 U.S. 231, 241, 246-247 (1951).

Paragraph D of the Maryland statute provides that

> "Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

The Maryland Court of Appeals construed "voluntary allowances" to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer." (App. A, p. 35a.)

Thus, the Maryland Act makes "voluntary allowances" or price discriminations a state-wide matter. The Robinson-Patman Act permits selective price discrimination, when that differentiation is made in good faith to meet an equally low price of a competitor. The two acts thus appear to conflict.[29]

[29] The Circuit Court for Anne Arundel County found this con-

The court below concluded there was no conflict. (App. A, p. 40a.) It reached this result by adopting one (and the minority) of two conflicting lower federal court views of the circumstance in which the "meeting competition" defense is available, *Enterprise Industries* v. *Texas Co.*, 136 F. Supp. 420, 421 (D. Conn. 1955), *reversed on other grounds,* 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957) (App. A, p. 37a, and p. 39a-40a.) In that case, the federal district court concluded that Section 2(b) permitted a seller to offer a buyer a lower price only when that particular buyer had been offered an equally low price by a competitor of the seller. *Id.* at 421. The court below held that because it had construed "voluntary allowances" to mean price reductions extended to enable a dealer to meet the lower price of a competing retail dealer, "there is no conflict between Paragraph D and § 2(b) . . . . Paragraph D of the state Act encompasses only the situation where temporary price reductions are given to a dealer [buyer] to meet the lower price of a *competing dealer* [buyer] and, in our view, § 2(b) of the federal Act does not extend to that situation." (App. A, p. 40a; emphasis in the original.) On this basis, the court below reached its conclusion that "there is no conflict between Paragraph D and § 2(b) of the . . . Robinson-Patman Act." (App. A, p. 40a.)

Enterprise Industries is explicitly contradicted by a decision of the United States Court of Appeals for the Seventh Circuit, *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana),* 466 F.2d 1163, 1175 (7th Cir. 1972),[30]

flict so self-evident that it granted a motion made by the present appellants for summary judgment on this issue. (App. C, p. 51a.)

[30] The holding in *Enterprise Industries* v. *Texas Co., supra,* is also implicitly contradicted by the Court of Appeals for the Tenth

by the Federal Trade Commission's interpretation of Section 2(b), and by the Department of Justice's interpretation of Section 2(b). In *Bargain Car Wash,* the Seventh Circuit, in an opinion written by the late Mr. Justice Clark, sitting by designation, and concurred in by now Mr. Justice Stevens, held that the Section 2(b) defense is available when a seller offers a lower price to a buyer to meet the equally low price offered by a competitor of the seller to its buyer. *Id.* at 1175. The Federal Trade Commission, which had once embraced the *Enterprise* doctrine,[31] has abandoned that position,[32] and has concluded that Section 2(b) is available when a seller is offering a buyer a lower price to meet the wholesale price offered by another seller to its buyer or is meeting the competition of an integrated refiner marketer.[33] The Department of Justice has con-

Circuit in *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 997-998 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) (Section 2(b) defense available when petroleum supplier lowers price and second supplier also lowers price to prevent losing retail customer because competition in prices existed and suppliers were at same functional level), and by the Court of Appeals for the Ninth Circuit in *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973) (dictum that Section 2(b) defense was not foreclosed when competing petroleum supplier reduces price to retail dealer). *See also Bunty* v. *Shell Oil Co.*, 1972 Trade Cases (CCH) ¶ 74,252 (D. Nev. 1972) (price differences offered competitive dealers in the same area resulted from good faith effort to meet prices offered by Shell's competitors to their dealers).

[31] *Hearings on Gasoline Price War in New Jersey Before a Subcommittee of the Senate Select Committee on Small Business,* 84th Cong., 1st Sess., pt. 2, at 450-451 (1955).

[32] *The Federal Trade Commission's Report on Anti-competitive Practices in the Marketing of Gasoline,* 3 Trade Reg. Rep. (CCH) ¶ 10,373, at 18,245 (1967).

[33] *Id.* "Consequently, we are of the opinion that a price reduction

curred in the Seventh Circuit's interpretation of Section 2(b), and has affirmed the Federal Trade Commission's position. *See* Department of Justice, *Report on The Robinson-Patman Act* 94 (1977). As this court has stated, it is a "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367, 381 (1969).

This Court has specifically left open the question of the circumstances in which the "meeting competition" defense of Section 2(b) will be available to a seller if the seller's discriminatory price cut to its dealer is responsive to a price cut made by a competitor of a seller to its own dealer.[34] *FTC* v. *Sun Oil Co.,* 371 U.S. 505, 512, n.7, and 529, n.19 (1963). The Court should not now permit that important question, on which there is a conflict in the lower federal courts, to be resolved by a state court without full plenary review.[35]

As construed by the court below, Paragraph D of the Maryland statute eliminates a seller's right to invoke Section 2(b) of the Robinson-Patman Act when

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by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer."

[34] It is true, of course, that the Section 2(b) defense is not available where the seller's price discrimination to his buyer is in response to price cuts generated initially and solely at the buyer's level. *FTC* v. *Sun Oil Co.,* 371 U.S. 505 (1963).

[35] This Court has previously characterized a question about "the scope and application of the § 2(b) defense" as "difficult and important." *FTC* v. *Sun Oil Co., supra,* 371 U.S. at 506.

a seller reduces a price to buyers to meet the equally low price offered by a competitor of the seller to a buyer. The decision thus narrows the scope of the Section 2(b) exemption and exposes a seller to liability under Section 2(a). This change in the scope of Section 2(b), an exemption this Court has considered an integral and essential element in the congressional plan to promote overall price competition and avoid price inflexibility, *see Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951), frustrates this congressional plan by prohibiting price discrimination even in a circumstance where Congress deemed it desirable.

Even if the court below were correct in its conclusion that Section 2(b) is available only in the limited circumstance where a competitor of the seller has offered a particular buyer a lower price, Paragraph D of the Maryland Act would still conflict with the Robinson-Patman Act and be pre-empted by it.

(1) The Maryland Act requires that all price differentials be uniformly extended to all service station dealers.[36] Yet this Court has held that Section 2(b) does not require uniform price reductions.[37] In fact,

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[36] "Under Paragraph D if one dealer gets a voluntary allowance or rebate, all Maryland dealers of that brand of product will get the same allowance." Defendants' Memorandum in Support of Their Response and Opposition to Plaintiffs' Motions for Summary Judgment, p. 16.

[37] In *Standard Oil Co.* v. *FTC, supra,* 340 U.S. at 250, this Court stated: "There is, on the other hand, plain language and established practice which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." The *Standard Oil* decision does not require uniform price differentiations to be extended to all customers under § 2(b). *See also Cadigan* v. *Texaco, Inc.,* 492 F.2d 383, 386 (9th Cir. 1974).

this Court has held that Section 2(b) prohibits uniform price reductions, and permits only price reductions designed to respond to the individual competitive situations presented, *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945), or to protect "competitors in individual transactions." *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957).[38] Yet Paragraph D requires price differentiations to be extended on a uniform, statewide basis, an extension of price differentiations not tailored, as this Court has said the Act requires, to the individual competitive situation.[39] Thus, Paragraph D requires a geographic and blanket extension of price cuts which the Robinson-Patman Act prohibits. When, as here, there is a direct and actual conflict between a state and federal law, *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971), and when, as here, compliance with both the state and the federal statute is impossible, *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), the state statute, under the Supremacy Clause, cannot stand.[40]

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[38] In *FTC* v. *Sun Oil Co., supra*, 371 U.S. at 517, the Court said Section 2(b) "permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further," *quoting H.R. Rep. No. 2287*, 74th Cong., 2d Ses. 16 (1936).

[39] *See also Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 535 (5th Cir.) *cert. denied*, 414 U.S. 859 (1973); *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *affirmed after remand*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra*, 466 F.2d at 1176; *Standard Motor Products, Inc.* v. *FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Exquisite Form Brassiere, Inc.* v. *FTC*, 360 F.2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966).

[40] *Cf. Shell Oil Co.* v. *Younger*, 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed*, No. 76-2784 (9th Cir. Aug. 13, 1976), in which the United States District Court for the Northern District of California invalidated a California statute which permitted a seller to grant a lower price to meet the equally low price offered by a competitor to an individual customer only if the same price reduction was granted to all other purchasers competing with the customer to whom the lower price was granted. In effect, that statute required uniform price reductions as does the Maryland statute. The district court found the statute unconstitutional because it frustrated the congressional purpose embodied in Section 2(b) of the Robinson-Patman Act to foster price competition and because it was in direct, actual conflict with the federal act. *See also Jones* v. *Rath Packing Co.*, decided March 29, 1977 (when —as is not true in this case—it would be possible to comply with a state law without triggering federal enforcement, the state requirement is consistent with federal law).

(2) The Maryland Act either limits the availability of the "meeting competition" defense (if the view of the court below of Section 2(b) is accepted) or enlarges its scope so greatly, by requiring uniform extension of price differentiations, that it requires a seller to violate Section 2(a) of the Robinson-Patman Act to comply with Paragraph D of the Maryland Act. Yet competition and the degree to which the national economy demand price competition and flexibility are areas in which Congress has fully expressed its policies in the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 1-7, as amended, and in the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. § 12-27, as amended by the Robinson-Patman Act. In either case, the Maryland legislature by virtue of Paragraph D, has interposed itself into the area—price competition and the protection of small business enterprises—where Congress has already struck a balance of the competing interests.[41] Paragraph D necessarily disturbs the balance Congress has set, by either narrowing or enlarging the scope of Sec-

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[41] *See generally* Department of Justice, *Report on the Robinson-Patman Act* (1977).

tion 2(b). State statutes which interfere with, or are contrary to the laws of Congress are invalid under the Supremacy Clause, *Gibbons* v. *Ogden,* 22 Wheaton 1 (1824), as are state statutes which stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

(3) The Robinson-Patman Act prohibits price differentials only where the effect may be substantially to lessen competition, to tend to create a monopoly, or to injure competition.[42] Paragraph D of the Maryland Act prohibits price differentials without regard to injury to competition.[43] Thus, the two statutes clearly conflict.

This Court is the appropriate forum to determine what is the proper scope and meaning of Section 2(b). It is also the appropriate forum to determine whether there is a conflict between the Maryland Act and the Robinson-Patman Act, and whether the latter preempts the former. These important questions, raised by the decision below, warrant plenary review by this Court.

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[42] The court below did not deal with this issue.

[43] In *Shell Oil Co.* v. *Younger,* 1976-1 Trade Cases, (CCH) ¶ 60, 960 (N.D. Cal. 1976), *appeal docketed,* No. 76-2784 (9th Cir. Aug. 13, 1976), a similar California statute which prohibited price differentials without regard to competitive injury was held invalid under the Supremacy Clause.

CONCLUSION

The questions presented by this appeal are substantial and warrant and require review by this Court. For this reason, probable jurisdiction of the appeal should be noted.

Respectfully submitted,

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Appellees.

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OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

[FILED ON BEHALF OF CHAMPLIN PETROLEUM COMPANY, CITIES SERVICE OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, KERR-McGEE CORPORATION, KOCH REFINING COMPANY, MARATHON OIL COMPANY, THE STANDARD OIL COMPANY (OF OHIO), SUNMARK INDUSTRIES, A DIVISION OF SUN OIL COMPANY OF PENNSYLVANIA, TENNECO OIL COMPANY AND TESORO PETROLEUM CORPORATION]

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Respondents, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of Maryland and Louis L. Goldstein, Comptroller of the Treasury, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General and John A. Woodstock, Assistant Attorney General hereby file objection to the motion by Champlin Petroleum Company, *et al.* (hereinafter referred to as

"petitioners"), for leave to file a brief *amici curiae*, in support of Appellants' jurisdictional statement. Respondents' objection is based on the following grounds:

1. As disclosed by petitioners' motion, two of the three issues which petitioners seek to discuss in their brief *amici curiae* have already been presented to this Court by the six appellants which have filed appeals and docketed Jurisdictional Statements. To the extent that petitioners' interests may be pertinent to the Commerce Clause and Robinson-Patman issues, their argument, at best, is redundant and duplicative of the treatment and consideration of these issues by the appellants.[1] For respondents to be put in the position of having to answer petitioners' arguments on these issues would unnecessarily cause additional briefing and would distract both counsel and the Court from proper consideration of the other issues involved in this case.

2. It is submitted that petitioners' motion, as it relates to both the Commerce Clause and Robinson-Patman issues, does not present any factual or legal issues that have not and will not be comprehensively represented by the appellants in this proceeding. Appellants' counsel have consistently demonstrated exceptional expertise in their treatment of these issues in this case. Under these circumstances, petitioners have failed to demonstrate that their participation

[1] In addition to the appeal and Jurisdictional Statement by Exxon Corporation and Phillips Petroleum Company, No. 77-10 (Sup. Ct. July 1, 1977), see the following, all of which deal with one or both of these issues: *Shell Oil Company v. Governor of the State of Maryland, et al., appeal docketed*, No. 77-11 (Sup. Ct. July 1, 1977); *Continental Oil Company, et al. v. Governor of Maryland, et al., appeal docketed*, No. 77-12 (Sup. Ct. July 1, 1977); *Gulf Oil Corporation v. Governor of Maryland, et al., appeal docketed*, No. 77-47 (Sup. Ct. July 8, 1977); *Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc. and Petroleum Marketing Corporation v. Governor of Maryland, et al., appeal docketed*, 77-64 (Sup. Ct. July 11, 1977).

would in any manner be necessary to, or enhance, the eventual disposition of these two issues and this case.

3. Petitioners' remaining interest, in the alleged conflict between Paragraph (F) of the Maryland statute and the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.*, is no more than a remote interest in one of several issues involved in the proceedings below which for good reasons, appellants apparently felt should not be presented to this Court.

4. As noted in the decision below (App. A, 32a),[2] the State of Maryland readily conceded that it could "not order allocation of petroleum products in conflict with the federal regulations enacted pursuant to the Emergency Petroleum Allocation Act" or promulgate regulations pursuant to any State law "which would conflict with present or future federal regulations." Recent decisions of this Court dictate that any enforcement of Paragraph (F) done in harmony with the federal statute would be proper, the operation of both reconciled so as to avoid preemption. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). The mere possibility of conflict is not sufficient to void state legislation. *DeCanas v. Bica*, 424 U.S. 351 (1976); *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470, 491-492 (1974); *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973).

5. It is therefore submitted that petitioners have not demonstrated any factual or legal issues that have not or will not be comprehensively represented by the appellants, nor presented any issue which should be, but has not been, fully presented to this Court. Petitioners have failed to demonstrate that their participation would in any manner enhance or be necessary to the eventual disposition of this case.

[2] Reference here is the Joint Appendix To Jurisdictional Statements filed by the appellants.

For the foregoing reasons, petitioners' motion should be denied.

Respectfully submitted,

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On Appeal from the Court of Appeals of Maryland

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42, for leave to file a brief *amicus curiae* in support of Appellants. This motion is necessitated by the refusal of the Appellee to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae,* the Chamber of Commerce of the United States of America, is set forth in detail in its brief. To summarize, the Chamber of Commerce is the largest business federation in the United States, representing both large and small enterprises, businessmen and women, throughout the United States, including the State of Maryland. The Chamber's membership includes representatives of virtually all vertically integrated industries, as well as those industries which utilize multiple retail distribution mechanisms, both company-operated and franchised.

The determination of the Court of Appeals of Maryland that the Motor Fuel Inspection Law, codified in the Maryland Annotated Code (1957), Art. 56, § 157 E (1972 Repl. Vol., 1976 Cum Supp.), does not violate

[1] Appellants have consented, pursuant to Supreme Court Rule 42.

the Commerce Clause of the United States Constitution (Art. I, § 8, Clause 3) is of broad-sweeping national significance and thus of grave concern to the Chamber and its members.

First, the Maryland statute, if upheld, will have a pronounced impact upon interstate commerce. Both the flow of petroleum products into Maryland and the marketing of these products and allied services in Maryland will be directly affected. Consequently, purchasers of petroleum products and related services, whose livelihoods are dependent upon their ability to transport persons and products in interstate commerce through Maryland, will bear the burden of any increased costs which would result from the enforcement of this law.

Second, during the last four years, the legislatures of thirty-three jurisdictions have adopted, considered, or had as pending business, proposals which are markedly similar, if not identical, to the statute at issue here. It is not mere idle speculation that, unless this Court reverses the determination of the court below, these other jurisdictions will enact their own versions of the Maryland statute. The potential for chaos in the economical and efficient marketing of petroleum products and related services throughout the United States, and the resultant adverse effects upon purchasers, is no less than astounding.

Third, and perhaps most importantly, the Chamber views this case as one whose impact far exceeds the confines of the petroleum industry. There are at least seventeen (17) major industries or industry groupings, with annual sales in excess of $238 billion, which market their goods and services through company-operated and franchised retail outlets. A mere extension of the

Maryland statute could directly and materially affect any or all of these industries.

The Chamber of Commerce, as the representative of a broad cross-section of American business, commands a vantage point which no other organization possesses; namely, the Chamber can assess the impact of this statute from the view of the affected industry, the affected business purchasers, and other industries which may be affected by similar legislation. As *amicus curiae*, we respectfully submit that the views of the Chamber of Commerce, a national business organization, are appropriate for consideration by this Court.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of Appellants be granted.

Respectfully submitted,

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On Appeal from the Court of Appeals of Maryland

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America [hereinafter the Chamber] is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 1615 H Street, N.W., Washington, D.C. 20062.

The Chamber is the largest business federation in the United States, with a total membership in excess of 69,000 enterprises and organizations representing businessmen and women throughout the United States, including the State of Maryland. More than 3700 state and local chambers of commerce and trade associations are members. Direct business memberships number in excess of 65,000, the overwhelming majority of which are corporations.

Unlike any trade association, the Chamber represents a broad cross-section of the American business community. Consequently, the Chamber's members include both vertically and horizontally integrated enterprises, and industries which have multiple methods of distribution of their goods and services, including company-operated and franchised retail outlets.

The interest of the Chamber and its members is rooted in the potential impact of this case as precedent which will determine the future availability and cost of petroleum products and allied services within the State of Maryland. Consequently, purchasers of these products and services, including business purchasers whose livelihoods are dependent upon their ability to transport persons and products in interstate commerce through Maryland at reasonable costs, are directly affected by the statute at issue here.

In addition, during the past four years, the legislatures of thirty-two other jurisdictions [1] have adopted, considered, or had as pending business, proposals which parallel or are identical to the statute under consideration here. The precedent established by the court below, unless overturned by this Court, will, in all probability, serve as the "green light" for the passage of similar legislation in other states. Thus, the disposition of this case will, factually if not legally, have a nationwide impact.

The spectre of divestiture statutes of this kind in a multitude of states directed at the petroleum industry is of substantial concern to the Chamber and its membership. Specifically, the relationship of the business community nationally as consumers of petroleum products will be directly and adversely affected. And, any disruptions of the market system inherent in the Maryland statute [2] will be exacerbated and geometri-

[1] For a complete listing of the jurisdictions in question, *see* n. 9, *infra* at 7.

[2] For examples of the disruptions which the Act would cause in Maryland, *see* 9-12 *infra*.

cally compounded if 32 other variations of the same statute were adopted by 32 different jurisdictions.[3]

Finally, this case is not a parochial issue affecting only the petroleum industry. At issue is the very existence of a dual market structure, in which company-operated retail outlets exist and compete side-by-side with franchised dealers. In this respect, the instant controversy may be viewed by future legislatures, legislators, and commentators as a basis for extending similar divestiture statutes to other industries.[4]

This case is not only dispositive of whether the Act in question violates the Commerce Clause of the Constitution (Article I, § 8, Clause 3). In the view of the Chamber, this case may also determine whether similar statutes are on firm constitutional footing, and, thus, whether they may be employed to invidiously discriminate against and deleteriously affect any industry which utilizes a dual marketing system.

REASONS FOR NOTING PROBABLE JURISDICTION

For more than 150 years, this Court has regarded the Commerce Clause of the Constitution (Art I, § 8, Clause 3) as an instrument to promote the orderly flow of commerce among the States in a "spirit of harmony and conciliation" and to preclude undue burdens on interstate commerce. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 206 (1824). *See Simpson* v. *Shepard,* 230

[3] The volume of fuel used nationally in 1975 for commercial transportation is discussed in n. 15, *infra* at 10.

[4] The implications of this case *outside* the petroleum industry are particularily troublesome to the Chamber and are discussed at n. 11 and n. 12, *infra* at 8 and 9, and the accompanying text.

U.S. 352, 398-400 (1913); *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 523 (1924); *Parker* v. *Brown,* 317 U.S. 341, 360 (1943); *McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 330-331 (1944); *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946); *H.P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 533-534 (1949).

Indeed, no one was more afraid of "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation", *Baldwin, supra,* at 522, *citing* Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 584; the Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259, than the authors of the Commerce Clause, who strove to eliminate discriminatory practices between the States.[5]

The Motor Fuel Inspection Law, as amended, Md. Ann. Code (1957), Art. 56, § 157E (1972 Repl. Vol., 1976 Cum. Supp.) [hereinafter the Act],[6] upheld by

[5] One commentator has noted that *Gibbons* "made the Constitution legally accomplish what was the moving cause of the adoption of the Constitution in the Constitutional Convention—'to keep the commercial intercourse among the states free from all invidious and impartial restraints.'" Willis, *Gibbons* v. *Ogden Then and Now,* 28 KY. L. J. 280 (1939). For a general discussion of the early history of the Commerce Clause, *see also* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 MINN. L. REV. 432 (1941); Lay, *The Commerce Clause and the Constitution—Its History and Development,* 60 AM. L. REV. 161 (1926); Fletcher, *Some Aspects of the Commerce Clause,* 3 MISS. L. J. 136 (1930); Vaught, *The Commerce Clause of the Constitution,* 21 A.B.A. J. 153 (1935).

[6] The Act, in pertinent part, reads as follows:

"(B) After July 1, 1974, no producer or refiner of petroleum products, shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and

the Court of Appeals of Maryland, prohibits the ownership and operation of retail service stations by producers and refiners. Consequently, the Act functions as an anticompetitive bar to the orderly and economical flow of petroleum products in interstate commerce by creating a special economic advantage which favors in-state dealers of these products and related services.[7] As a result, the Act directly contravenes the long established principle that state statutes shall not operate in a discriminatory manner. *See Hunt* v. *Washington State Apple Advertising Comm.*, —— U.S. ——, 45 U.S.L.W. 4746, 4751 (1977); *Great Atlantic & Pacific*

operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any persons, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealers."

Md. Ann. Code (1957), Art. 56. § 157 E (1972 Repl. Vol., 1976 Cum. Supp.)

[7] The Act also mandates in subparagraph (D) that:

Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

The Chamber, as *amicus*, shares the belief vigorously expressed by several Appellants in their respective Jursdictional Statements that this provision runs afoul of the "meeting competition" defense permitted under the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.* (1976). For the reasons so persuasively set forth by Appellants, the Chamber urges this Court to note probable jurisdiction with respect to both questions presented.

Tea Co. v. *Cottrell*, 424 U.S. 336 (1976); *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951); *H.P. Hood & Sons, Inc.* v. *Du Mond, supra; Baldwin* v. *G.A.F. Seelig, Inc., supra; Buck* v. *Kuykendall*, 267 U.S. 307 (1925).

In its broader implications, the Act is the precursor of even more pernicious disruptions of an industry which is critical to the well-being of the entire economy.[8] During the last four years, the legislatures of 33 jurisdictions,[9] including the State of Maryland, have

[8] The interrelationship of the petroleum industry and other principal industries is undisputed. For example, the National Council of Farmer Cooperatives has estimated that 90% of the energy requirements of the food and fiber production industries is provided by petroleum products and natural gas. Statement by Bill Brier, Director of Energy Resources, National Council of Farmer Cooperatives, *Effects of Divestiture Legislation on Food and Fiber Production* 2 (1976).

The airline industry would also incur increased costs if the marketing structure of the petroleum industry were disrupted. These costs would result from having to deal with many different companies in order to obtain the same amount of fuel, as well as the necessity of assuming responsibility for quality control, which is currently handled by fuel suppliers themselves. Letter from Donald J. Lloyd-Jones, Sr. Vice President, Operations, American Airlines, to all Members of the United States Senate, concerning S.2387, the Divestiture Bill, June 21, 1976.

While the Maryland statute at issue here is limited to the retail service station market, the underlying principle of the Act—namely, that state legislatures may prohibit the retail marketing of petroleum products by producers or refiners—is applicable to the entire gamut of petroleum products which are marketed or may be marketable by franchised dealers.

[9] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee,

adopted, considered, or had as pending business, proposals which parallel or are identical to the statute at issue here.[10] It is reasonable to assume that, unless the decision of the court below is overruled by this Court, many, if not all, of these jurisdictions will enact their own versions of this legislation. The result may very well be a disruption of the orderly flow of commerce on a truly national scale.

Further, the compulsory disengagement of a dual marketing structure, eliminating company-operated retail outlets to the economic advantage of in-state franchisee-operated retail service stations, if permitted in the petroleum industry, might then be attempted in industries which employ similar marketing structures.[11] Many of these industries are vertically integrated.[12] Consequently, the ultimate disposition of the case at bar has the potential to affect a vast array of industries. Thus, the Chamber, as *amicus curiae,* urges this Court to view this case not only from the perspective of the companies directly affected, but also in its broader ramifications outlined above.[13]

The anticompetitive effects of this statute upon interstate commerce were graphically demonstrated to the trial court below. Indeed, Appellants, Petroleum Marketing Corporation, Kayo Oil Company and Ashland Oil Inc., presented persuasive testimony that they may be forced to abandon their retail marketing operations in the State of Maryland if the Act were in effect. (E. 388, E. 396, E. 457, E. 492.)[14] In each instance, the witnesses explained that only through company-operated facilities, as part of an integrated production-distribution system, could costs be closely monitored

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Vermont, Washington and West Virginia. The Florida law (Fla. Stat. §526.151) was declared unconstitutional in *Exxon Corp.* v. *Conner*, No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon City., Fla. Jan. 23, 1975). The Delaware statute (Del. Code, Title 6, § 2905-06 (1976 Cum. Supp.)) is presently the subject of litigation.

[10] The proposals would either prohibit or limit company-operated retail service stations, require uniform statewide pricing on allowances, or both.

[11] The Department of Commerce lists 17 major categories of goods and services which are available to the American public through dual distribution marketing programs involving both company-operated and franchisee-operated retail outlets. For 1977, the Department estimates that there exists a total of 463,482 such establishments, 87,127 of which are company-operated. The balanced, 376,355, are franchisee-operated. These establishments account for a total sales volume of over $238 billion. The company-operated outlets account for some $36 billion in sales, compared to over $202 billion for the franchisee-operated outlets. The types of business range from automobiles and truck dealers to those which provide business aids and services, to retail food outlets. U.S. Department of Commerce, FRANCHISING IN THE ECONOMY 1975-77, at 26 (Dec. 1976).

[12] New statutes similar to the Act at issue here could be enacted to cover fast food restaurants, soft drink bottlers, automobile and truck dealers, automotive parts and services and non-food retailers, and other partially or totally integrated industries.

[13] Not only does this suit present a substantial federal question on its facts, but also it raises significant economic considerations.

The economic validity of vertical integration as a structural tool of industrial organization and the relative efficiencies which it produces are challenged by any attempt to compel divestiture, as typified by the Maryland Act at [illegible] here. Vertical integration serves to reduce, among others, [illegible]tion costs and research costs, and to assure security of sup[illegible]hich also serves to reduce costs by assuring continuity of operations. L[illegible]ler, *Integration and Competition* in VERTICAL INTEGRATION IN THE OIL INDUSTRY, 7-20 (E. Mitchell ed. 1976). It is precisely these lower operating costs of integrated companies that higher cost competitors find discomforting.

[14] "E" references are to the Joint Record Extract prepared for the Court of Appeals below.

and low prices offered to consumers. Under the Maryland Act, however, the private brand companies would be compelled to divest their retail outlets. Costs would thereby be increased to consumers, and the companies themselves would be forced out of the business when effective price competition could no longer be maintained. (E. 400.) The withdrawal of these companies from the market would only exacerbate an already aggravated situation by reducing competitive price pressures on the remaining service stations, thus forcing prices up even further. (E. 509-510.) to the detriment of all consumers.[15]

In addition, the Act would operate to discourage new private brand integrated companies from entering the State since dealer-operated stations are simply too unprofitable and inefficient. (E. 510.)

Finally, the Act would prohibit marketers who are not yet producers or refiners from engaging in "backwards integration." This ban on integration operates as a barrier to market entry both from the perspective of the refining of crude products and from the standpoint of retail competition. (E. 402.) Hudson Oil Company, for example, will either be precluded from acquiring any refinery or be forced to abandon its retail operations if the Act is upheld. (E. 500.)

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[15] During 1975, commercial vehicles (trucks over 10,000 pounds in gross vehicle weight) used 18.2 billion gallons of the nation's fuel. U.S. Department of Transportation, INTER-AGENCY STUDY OF POST-1980 GOALS FOR COMMERCIAL MOTOR VEHICLES VI-13 (June 1976). The national impact of the adoption by state legislatures of statutes similar to the Maryland Act, with the concomitant predicted rise in prices, would substantially affect the cost of the transportation of persons and products in interstate commerce.

In light of these dramatic facts, the State of Maryland is hard-pressed even to suggest that the Act at issue is merely a local statute regulating local activities. Indeed, the Court of Appeals' reliance upon *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U.S. 129 (1921) (App. A at 20a-22a) in finding no violation of the Commerce Clause is sorely misplaced. As Mr. Justice Clarke noted, the issue in that case was whether a product of local industry was "rendered an instrumentality of interstate commerce" by the fact that it was subsequently shipped out of state. 257 U.S. at 135.

In determining whether a suspect activity impacts upon interstate commerce, the Court will look both to the interstate sources of the product and the number of interstate travelers patronizing the businesses. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 302 (1964); *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 309-310 (1964); *see also Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Daniel* v. *Paul*, 395 U.S. 298 (1969); *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *see generally, Perez* v. *United States*, 402 U.S. 146, 153 (1971); *United States* v. *Women's Sportswear Mfrs' Ass'n*, 336 U.S. 460, 464 (1949).

In the instant case, since no crude oil is produced or refined in Maryland (App. A at 19a), the product to be regulated at the retail market is already in the stream of interstate commerce when it enters the State. In addition, interstate travelers using Maryland's roads purchase these products. (App. D at 62a, 81a.) Thus, the Act, as Appellants demonstrated at trial, has a direct impact upon interstate commerce.

These egregious infringements upon the free flow of products in the stream of interstate commerce are even more offensive because they effectively discriminate against foreign (i.e., non-Maryland) companies and favor local (i.e., Maryland) dealers. As previously noted, this Court has consistently condemned state statutes which have the "principal effect of not only burdening interstate sales . . . but also discriminating against them." *Hunt* v. *Washington State Apple Advertising Comm.*, —— U.S. ——, 45 U.S.L.W. 4746, 4751 (1977).

In the instant case, this discrimination takes at least three forms. First, by requiring producers and refiners who desire to market their products in Maryland to convert their company-operated retail outlets to dealer-operated outlets, the marketing costs of the producers and refiners will increase. Second, the statute has the effect of stripping away the competitive advantage, detailed above, which the "private brand" Appellants enjoy by virtue of their integrated structure. Third, the statute provides a concomitant advantage to local dealers who are neither required to expend money to alter their marketing structure nor lose any competitive advantage by virtue of compulsory divestiture.[14]

In sum, then, the Act stands in clear violation of the principle enunciated by the Court in *Polar Ice*

[14] That less restrictive means are available to the State of Maryland to protect the economic welfare of local dealers without discriminating against foreign competitors is carefully articulated in the Jurisdictional Statement filed by Appellants Exxon Corporation and Phillips Petroleum Company.

Cream and Creamery Co. v. *Andrews*, 375 U.S. 361 (1964), that Maryland "may not, in the sole interest of promoting the economic welfare of its [dealers], insulate the [Maryland retail fuel] industry from competition from other states." *Id.* at 377.

Thus, the Act impermissibly "neutralize[s] the economic consequences of free trade among the states", *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. at 522-523, by compelling out-of-state competitors to engage in less efficient, more costly activities, thereby protecting local businesses to the detriment of consumers and real or potential out-of-state competitors.

CONCLUSION

For the reasons set forth above, we urge the Court to note probable jurisdiction.

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IN THE

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OCTOBER TERM, 1977

No. 77-10

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-11

SHELL OIL COMPANY, *Appellant*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

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CONTINENTAL OIL COMPANY, ET AL., *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-47

GULF OIL CORPORATION, *Appellant*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-64

ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION, *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

(Continued on inside cover)

The Daily Record Co., Baltimore, Md. 21202

OBJECTION TO MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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IN THE

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OBJECTION TO MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

Respondents, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of Maryland and Louis L. Goldstein, Comptroller of the Treasury, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General and John A. Woodstock, Assistant Attorney General hereby file objection to the motion by the Chamber of Commerce of the United States of America (hereinafter referred to as "petitioner") for leave to file a brief *amicus curiae* in support of Appellants' jurisdictional statements. Respondents' objection is based on the following grounds:

1. The interest of the petitioner, as disclosed in its motion, is no more than a remote interest in the issues involved in the case.

2. As disclosed in petitioner's motion, the only issue which the petitioner seeks to discuss in his brief *amicus curiae*, namely the Commerce Clause, is already presented to this Court by seven appellants who have filed appeals and docketed Jurisdictional Statements in this case.[1] Thus, to the extent that petitioner's interest may be pertinent to the Commerce Clause issue in which they are interested, their argument, at best, is

[1] *Exxon Corporation and Phillips Petroleum Company v. Governor of the State of Maryland, et al., appeal docketed,* No. 77-10 (Sup. Ct. July 1, 1977); *Continental Oil Company, et al. v. Governor of Maryland, et al., appeal docketed,* No. 77-12 (Sup. Ct. July 1, 1977); *Gulf Oil Corporation v. Governor of Maryland, et al., appeal docketed,* No. 77-47 (Sup. Ct. July 8, 1977); *Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc. and Petroleum Marketing Corporation v. Governor of Maryland, et al., appeal docketed,* No. 77-64 (Sup. Ct. July 11, 1977).

duplicative and redundant to the treatment and representation of these issues by the appellants. For respondents to be put in the position of having to respond to petitioner's arguments on these issues would unnecessarily cause further pleadings to be enlarged and would be likely to distract both counsel and the Court from the other issues involved.

3. It is submitted that petitioner's motion does not demonstrate any factual or legal issues that have not and will not be comprehensively represented by the appellants in this proceeding, all of which have, and are represented by, an abundance of counsel who have consistently demonstrated exceptional expertise in their treatment of the issues involved in this case. Under all the circumstances, petitioner has failed to demonstrate that its participation would in any manner by necessary to, or enhance, the eventual disposition of this case.

For each and all the foregoing reasons, the Motion of the Chamber of Commerce of the United States of America should be denied.

Respectfully submitted,

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The Chamber of Commerce of the United States of America [hereinafter the Chamber], by its attorneys, hereby replies to the objection raised by Appellees to the motion of the Chamber for leave to file a brief *amicus curiae* and brief *amicus curiae* in support of Appellants in this litigation:

1. The Chamber and its more than 69,000 business members have a substantial interest in the outcome of this litigation. The statute at issue challenges the viability of multi-tiered distribution systems utilized by integrated industries. There are at least seventeen (17) major industries or industry groupings, with annual sales in excess of $238 billion, which presently market their goods and services through company-operated and franchisee-operated outlets. The statute represents a direct assault upon the method of operation of the Chamber's members which are integrated enterprises, as well as those members which employ company-operated and franchisee-operated retail outlets.

2. Those members of the Chamber who are business purchasers of petroleum products and allied

services within the State of Maryland will be directly affected by the Motor Fuel Inspection Law at issue here. The increased cost of petroleum products which would result from the implementation of this divestiture statute will adversely affect those businessmen and women whose livelihoods are dependent upon their ability to transport persons and products through Maryland at a reasonable cost.

3. The Maryland Act, if upheld, will have a similar adverse affect on Chamber members across the Nation. In the past four years the legislatures of 32 other jurisdictions have adopted, considered, or had as pending business, proposals which parallel or are identical to the statute under consideration. Unless the decision of the court below is overturned, it will serve as a "green light" for the passage of similar legislation in other states.

4. In asserting the various interests of its members, the Chamber is fulfilling the "traditional function of an amicus . . . to assert 'an interest of its own separate and distinct from that of the [parties],' whether that interest be private or public." *United States* v. *Barnett,* 376 U.S. 681, 738 (Goldberg J., Warren Ch. J. and Douglas J. dissenting).

The Chamber submits that its discussion of the legal and policy issues directly affecting its members, both in the State of Maryland and nationwide, can materially assist in the consideration of this case. The broad issues can not be adequately addressed by the Appellants since their interests

do not represent those of the business community as a whole.

5. Finally, Appellees, in opposition to the Chamber's motion, can not be heard to say in the same breath that the Chamber's brief is "duplicative and redundant" of Appellants' arguments, and also imposes a burden upon Appellees by "unnecessarily caus[ing] further pleadings to be enlarged." These self-contradictory allegations have no basis in fact and demonstrate Appellees' total inability or unwillingness to appreciate the Chamber's role as a friend of the court in the instant case. The Chamber submits that, in determining whether to note probable jurisdiction, it is appropriate for this Court to be apprised fully of the broad-sweeping ramifications of the statute at issue as it relates to the orderly flow of commerce among the States.

For each and all of the foregoing reasons, the Motion of the Chamber of Commerce of the United States of America should be granted.

Respectfully submitted,

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SHELL OIL COMPANY, *Appellant*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-12

CONTINENTAL OIL COMPANY, ET AL., *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-47

GULF OIL CORPORATION, *Appellant*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-64

ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION, *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

(Continued on inside cover)

The Daily Record Co., Baltimore, Md. 21202

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-10

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY, *Appellants,*
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees,*

No. 77-11

SHELL OIL COMPANY, *Appellant,*
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees,*

No. 77-12

CONTINENTAL OIL COMPANY, ET AL., *Appellants,*
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees,*

No. 77-47

GULF OIL CORPORATION, *Appellant,*
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees,*

No. 77-64

ASHLAND OIL, INC., COMMONWEALTH OIL
REFINING COMPANY, INC., AND PETROLEUM
MARKETING CORPORATION, *Appellants,*
v.
GOVERNOR OF THE STATE OF
MARYLAND, ET AL., *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

I.

A.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE.

This is a direct appeal from the judgment of the Court of Appeals of Maryland upholding the validity of Chapter 854 of the Laws of Maryland of 1974, as amended by, Chapter 608 of the Laws of Maryland of 1975 (codified at Maryland Annotated Code Article 56, Sections 157E(b) through (h) (1972 Repl. Vol., 1976 Cum. Supp.)) under the Constitution and laws of the United States.

The Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company

> personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.
>
> (G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.
>
> (H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.
>
> (The italicized portions are those added by Chapter 608 of the Laws of Maryland of 1975.)

Appellants argue (1) that the statute deprives them of their property without due process of law, (2) that the Act, *in toto*, violates Article I, Section 8 of the United States Constitution, and (3) that Paragraph (D), providing for uniform price assistance programs through "voluntary allowances" conflicts with provisions of the Robinson-Patman Act, 15 U.S.C. § 13, and,

therefore, is invalid under the Supremacy Clause of Article VI of the United States Constitution. Appellees submit that the law was enacted pursuant to the State's proper exercise of its long recognized power to regulate its internal commercial and business affairs and that this appeal does not present a substantial federal question for this Court's consideration.

B.

THE PROCEEDINGS BELOW.

This litigation was commenced when Exxon Corporation, prior to the effective date of the statute, instituted suit on June 17, 1974, in the Circuit Court for Anne Arundel County, Maryland, seeking declaratory and injunctive relief from alleged constitutional and statutory infirmities in the law. Over the next nine months eight additional parties filed a total of six suits challenging the Act on state and federal constitutional grounds. All cases were consolidated for purposes of trial.

At trial and on appeal appellants raised the host of constitutional and statutory objections to the statute now presented to this Court. The Circuit Court for Anne Arundel County, on October 14, 1975, granted appellants' Motion For Partial Summary Judgment as to Paragraph (D) of the Act holding that provision to be in conflict with and preempted by provisions of the Robinson-Patman Act. (App. C, 49a-51a).[1] On January 27, 1976, the Circuit Court for Anne Arundel County entered a final judgment and decree declaring the statute violative of the due process and equal protection clauses of the federal Constitution and invalid as a taking of appellants' property without just compensation. (App. D, 53a-134a). The challenge to the Act under

[1] The references to Appendicies A-D, as used herein, are to the Joint Appendix To Jurisdictional Statements filed by appellants.

the Commerce Clause was rejected by the trial court. (App. D, 123a). Upon appeal to the Maryland Court of Appeals, the decision of the trial court was unanimously reversed and the statute was upheld against all constitutional challenge. (App. A, 1a-44a).[2]

II.

ARGUMENT

THE CASE PRESENTS NO FEDERAL QUESTIONS NOT PREVIOUSLY DECIDED BY THIS COURT OR IMPORTANT ENOUGH TO WARRANT PLENARY TREATMENT.

A.

APPELLANTS' CONTENTION THAT THE ACT CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Of the seven oil companies appealing the judgment of the Maryland Court of Appeals only Continental Oil Company and its wholly owned subsidiary Kayo Oil Company question the validity of the Act upon substantive due process grounds. (Continental and Kayo Jurisdictional Statement, No. 77-12, at 13-18). These appellants acknowledge this Court's unbroken line of authority upholding the power of state legislatures to respond to practices which they deem "injurious . . . in their internal commercial and business affairs," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v.*

[2] The opinion of the Court of Appeals of Maryland containing the judgment of that court reversing the judgments of the Circuit Court for Anne Arundel County is officially reported at 279 Md. 410 (advance reports) and unofficially at 370 A.2d 1102 (advance reports). A supplemental opinion of the Court of Appeals on motions for reconsideration and stay of mandate is officially reported at 279 Md. 456 (advance reports) and unofficially at 372 A.2d 237 (advance reports).

Security Life Insurance Co., 336 U.S. 220 (1949); *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934) and concede that this Court has made clear that it will not substitute its "social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Nevertheless Continental and Kayo here renew the argument, unsuccessfully presented to the Maryland General Assembly, that Paragraph (C) of the Act will not "preserve or enhance competition," in the retail sale of gasoline.

Appellants were afforded extraordinary access to the legislative process prior to the enactment of the law. (App. A, 7a-10a; E. 65-68).[3] In response to the gasoline crisis of 1973 the Comptroller of the State Treasury directed questionnaires designed to elicit a broad spectrum of information relevant to the operation of the retail gasoline market to Maryland's 4,055 registered service station dealers and to the twenty major oil companies operating within the state, including Continental and Kayo. (App. A, 7a-8a; E. 65-66). As a result of the information obtained identical bills were introduced into both Houses of the Maryland General Assembly prohibiting producers and refiners of petroleum products from directly operating retail service stations. Public hearings were held on the bills by Senate and House Committees of the State legislature; at both hearings the major oil companies were fully represented (E. 67) and expressed their view that the direct operation of retail service stations provided them with the most efficient and least costly method of satisfying consumer demand (E. 692, 703). Following these hearings both bills were passed by the General

[3] "E" references as used herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

Assembly. Subsequently opponents of the bills, including five major oil companies, again presented their views at a special veto hearing held by the Governor (E. 67). Unsatisfied with the outcome of the legislative process, Continental and Kayo ask this Court to subject the Maryland gasoline market to a "close scrutiny" and supplant the judgment of the General Assembly with their view of the public welfare.

Appellants' attack upon the statute is at odds with the proper standard of review of state economic regulation under the 14th Amendment.[4] State legislatures "may within extremely broad limits control practices in the business — labor field," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). This Court has made clear that "courts are both incompetent and unauthorized" to pass upon the wisdom of a particular economic policy or "the adequacy and practicability of the law enacted to forward it." *Nebbia v. New York, supra* at 537. The legislature was presented with evidence that refiners and producers of gasoline were "favoring company operated stations in the allocation of gasoline," and that as a result "some service station dealers were forced to close." (App. A, 14a). Proponents of the Act testified before the General Assembly that major oil companies were in the process of assuming total control over the gasoline market through the use of company owned stations (E. 721), and evidence was presented at trial that many dealer operated stations were being converted to company operation. (App. A, 14a). Expert testimony was adduced to the effect that the Act would "increase the competi-

[4] Appellants' citation of Roe v. Wade, 410 U.S. 113, 152-56 (1973) and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) is inapposite to this appeal. Kayo's asserted right to "do business by direct retail sales" does not implicate the fundamental rights of privacy and association underlying the Court's heightened review in those cases. *See, e.g., Roe* at 156.

tiveness of the gasoline market" and therefore "increase the benefits that accrue to the driving public that come from the increase in competitive activity." (E. 551). "The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less." *Ligget Co. v. Baldridge,* 278 U.S. 105, 114-15 (Holmes, J. dissenting); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra,* at 167. It is submitted that the Act, taken as a whole, is a rational response to the direct operation of retail service stations by vertically integrated producers and refiners of gasoline.[5]

Moreover, Paragraph (C) of the Act bears a "rational relation" to that constitutionally permissible objective. Expert testimony adduced at trial concluded that the Act would aid competition by denying producers and refiners the power to focus windfall profits from crude prices upon their competitors and by increasing the amount of gasoline available to independent non-

[5] It is apparent that the legislature intended to completely prohibit the direct operation of retail service stations by producers and refiners of gasoline. By Paragraph (B) it mandated that as of the effective date of the Act no new direct operations could be opened; by Paragraph (C) it allowed affected companies one year to restructure their operations before they fell within the strictures of the law. Appellants' attempt to divorce Paragraph (C) from the Act conflicts with the approach taken by this Court in reviewing such economic legislation under the Due Process Clause. *Compare,* North Dakota State Board of Pharmacy v. Snyder's Drug Stores; Ferguson v. Skrupa, *supra.* The legislature could reasonably conclude that the danger to competition inherent in the operation of retail stations by vertically integrated companies was sufficient to prohibit such operations. That judgment is not undermined by the "phase-out" period embodied in Paragraph (C), or by the requirement of Paragraph (F) that producers and refiners of gasoline fairly allocate fuel among independent dealers after ceasing operation of their company stations.

integrated companies who provide "the only source of aggressive price competition in the retail gasoline market." (E. 551-52, 555, 579). The prohibitions of Paragraph (C) fulfill both objectives. The legislature could rationally conclude that the concentration of such economic power inherent in the direct operation of the existing 209 retail service stations by producers and refiners of gasoline within this state would not be in the best interest of the welfare of its citizens. Insisting that there is "no danger to competition" by virtue of such operations, Continental and Kayo do no more than question the wisdom of the Act and ask this Court to vitiate that legislative judgment by engaging in a balancing process which it has rejected on numerous occasions. *See, e.g., Ferguson v. Skrupa, supra* at 731; *Williamson v. Lee Optical Co., supra* at 487.

Appellants' contention that Paragraph (C) constitutes a "radical departure from traditional governmental economic regulation," flies in the face of the authority cited in their brief. Appellants admit that business conduct "deemed inimical to the public welfare, although not violative of the antitrust laws" is a proper subject for state regulation. (Continental and Kayo Jurisdictional Statement No. 77-12 at 11 n.14).[6] The strictures of the Fourteenth Amendment are not heightened in cases where there is "no suggestion of any monopoly or monopolistic practice." *Nebbia v. New York, supra* at 531-32. There is no "closed class or category of businesses affected with a public interest." *Id.* at 536. Appellants' assertion that the Maryland Court's decision is the "first decision of the highest court of any state holding that such legislation is not

[6] Appellants concede that such activities may be "remedied by divestiture." However, Continental and Kayo are not being required to divest existing company-owned stations. The Act only prohibits such vertically integrated companies from operating retail stations with company employees.

violative of the federal constitution," is patent error.[7] The propriety of the Act is attested to by similar proposals enacted by or introduced in fourteen state legislatures,[8] Congressional divestiture proposals and opinions of this Court. *See, e.g.*, H.R. Rep. No. 1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 1005, 94th Cong., 2d Sess., (1976); *FTC v. Sun Oil Company*, 371 U.S. 505, 528 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 328-34 (1962). It is submitted that Paragraph (C), and the Act *in toto*, bear a relation to the "evil" found by the General Assembly to inhere in the operation of retail service stations by vertically integrated oil companies. This Court has made clear that "state legislatures have constitutional authority to experiment with new techniques," and are entitled "to their own standard of the public welfare." *Day-Brite Lighting, Inc. v. Missouri, supra* at 423. It is submitted that the Act is not "palpably in excess" of the legislature's power and that the judgment of the Maryland Court of Appeals upholding the General Assembly's attempt to protect the public welfare in response to recent developments in the gasoline market does not present a substantial federal question for this Court's consideration. *West Coast Hotel Co. v. Parrish, supra* at 398.

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[7] Appellants' own citations state that the Florida and New Hampshire courts invalidated the statutes on *state* constitutional grounds. The New Hampshire court concluded that its statute constituted an unlawful taking of property in violation of the New Hampshire Constitution. "In all other respects the court was of the opinion that the proposed statute was constitutional." (Continental and Kayo Jurisdictional Statement, No. 77-12, at 11 n.14). The court, relying upon Williamson v. Lee Optical Co., *supra*, held the act immune from federal due process attack.

[8] *See*, Continental and Kayo Jurisdictional Statement, No. 77-12, at 10, and n.13.

B.

APPELLANTS' CONTENTION THAT PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT ARE INVALID UNDER THE COMMERCE CLAUSE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The appellants' attempt to employ the Commerce Clause as a sword is entirely inappropriate and their reliance on that clause misplaced. As the Maryland Court of Appeals observed, the law in question is directed at "a wholly intrastate activity." (App. A, 18a). The Act has absolutely nothing whatever to do with the interstate transportation, sale or movement of gasoline. Rather, it prohibits gasoline stations in Maryland from being operated by vertically integrated oil companies. Thus, by the time that the gasoline in question can in any way be said to come in contact with the Act, it has already completed its interstate travel and finally come to rest in Maryland awaiting final sale. Because this gasoline has already been earmarked for Maryland by the appellants, these final retail sales are *per force* of an intrastate nature and not an intermediate or preliminary transfer in a stream of commerce that is to be continued. The last step in the gasoline's movement in that stream is its delivery to retail dealers. In this respect the case is distinguishable from *Stafford v. Wallace*, 258 U.S. 495 (1922), where intrastate activity was found to be subject to regulation by Congress under the commerce power because that activity was "but a throat" through which interstate commerce flowed. Here, the interstate shipment of gasoline and the preliminary preparation incident thereto, have already come to a complete end *before* the Maryland statute comes into play.

This case does not fit into any of the categories of Commerce Clause cases which the appellants cite. The Act applies evenhandedly to all and does not discriminate against commerce in any fashion. Interstate

commerce is not taxed, in a discriminatory manner or otherwise;[9] neither incoming[10] nor outgoing[11] interstate commerce is at all regulated; the Act does not represent an impermissible attempt to retain resources within the state by creating a barrier to interstate commerce;[12] the transportation of gasoline in interstate commerce is in no way impeded;[13] and, the Act does not impinge upon the privileges or immunities of any citizen.[14]

The operation of the Act does not impair interstate commerce. Only the final retail sale, a wholly intrastate activity, is at all affected and, even then, not in any way having cognizable ramifications on interstate commerce. In *Breard v. City of Alexandria,* 341 U.S. 622 (1951), and *Plumley v. Massachusetts,* 155 U.S. 461 (1894), this Court sustained local and state legislation where the unsuccessful appellants argued that the legislation involved, which touched upon the final retail sale of articles that at one time had been in interstate

[9] Boston Stock Exch. v. State Tax Comm'n, 97 S. Ct. 599 (1977); Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940).

[10] Hunt v. Washington State Apple Advertising Comm'n, 97 S. Ct. 2434 (1977); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511 (1935); Minnesota v. Barber, 136 U.S. 313 (1890).

[11] H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949). Cases sustaining a state statute concerning outgoing commerce include Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950), and Parker v. Brown, 317 U.S. 341 (1943).

[12] Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Johnson v. Haydel, 278 U.S. 16 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[13] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[14] Toomer v. Witsell, 334 U.S. 385 (1948).

commerce, was repugnant to the Commerce Clause. In the instant case no tax, prohibition, nor any impediment to the free flow of interstate commerce is created by Maryland's statute. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The Maryland law clearly meets this standard.

What we have, then, is not really a Commerce Clause case, but rather a statute the validity of which must be measured in relation to the state's police power. The overlap between Commerce Clause and police power considerations is often substantial, but the two concepts should not be confused. This was recognized by Mr. Justice Stone, dissenting in *Di Santo v. Pennsylvania,* 273 U.S. 34, 43-45 (1927), in an opinion, concurred in by Justices Holmes and Brandeis, which can fairly be said to have evolved into the present-day majority view. There Mr. Justice Stone observed:

> The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation . . . . Such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the state by the decisions of this Court.
>
> * * * * * *
>
> But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead

to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines. *Id.* at 44.

For these reasons, the Act does not do violence to the Commerce Clause, and represents a permissible exercise of Maryland's police power.

C.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IS CLEARLY CORRECT AND NO CONFLICT EXISTS BETWEEN PARAGRAPH (D) OF THE MARYLAND ACT AND THE ROBINSON-PATMAN ACT.

Four of the appellants contend that Paragraph (D) of the Maryland Act is in conflict with the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1970), and is therefore void under the Supremacy Clause of the United States Constitution, (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 13-21; Shell Jurisdictional Statement, No. 77-11, at 8-26; Gulf Jurisdictional Statement, No. 77-47, at 20-24). These appellants collectively argue that Paragraph (D) is in conflict with the so-called "meeting competition defense" contained in Section 2(b) of the Robinson-Patman Act and federal decisions interpreting it, and thus stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting that section. Additionally, one appellant argues that Paragraph (D) would expose it to liability under Section 2(a) of the Robinson-Patman Act for primary-level injury. (Shell Jurisdictional Statement, No. 77-11, at 18-21). As demonstrated below, these several arguments are so lacking in substance as to be without merit and, under the prior decisions of this Court, clearly present no federal question which warrants plenary review.

1. No conflict exists between Paragraph (D) of the Maryland Act and Section 2(b) of the Robinson-Patman Act.

Because appellants present this issue in several ways,[15] appellees believe that the Court may be assisted by a somewhat simpler, collective statement of the appellants' contention on the Robinson-Patman issue.[16] As argued to the court below,[17] and now to this Court, appellants contend that Section 2(b) of the Robinson-Patman Act permits an oil company supplier to discriminate in price among its branded dealer customers who face competitive pressure as a result of lower prices granted by a competing supplier to the competing supplier's branded dealer customers. (Shell Jurisdictional Statement, No. 77-11, at 8; Exxon and Phillips Jurisdictional Statement, No. 77-10, at 14; Gulf Jurisdic-

[15] Exxon and Phillips Jurisdictional Statement, No. 77-10, at 4; Shell Jurisdictional Statement, No. 77-11, at 4-5; Gulf Jurisdictional Statement, No. 77-47, at 3.

[16] Two appellants have misstated the factual premises for the Robinson-Patman issue and, thus, seek to raise contentions not in issue here. They have asserted that voluntary "allowances are restricted to the dealers who are offered price reductions *from other suppliers*. . . ." (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 8 (emphasis added)). There is no factual basis in the record for this proposition. Appellees do not contest, and the court below did not rule, that Paragraph (D) of the Maryland Act would in any way preclude an oil company seller from discriminatorily lowering its prices in good faith to meet an equally low price offered to the *same dealer customer* by another supplier. Paragraph (D) clearly does not apply to that situation.

[17] Appellants' position regarding the Congressional purposes and effects of the "meeting competition defense" contained in Section 2(b) of the Robinson-Patman Act was that "a supplier has a right to grant a competitive allowance among customers to whom a lower competitive offer has been made *or who otherwise face competitive pressures as a result of lower prices granted by a competing supplier to its dealer customers*." The reference is to the brief filed jointly by appellants here in the Court of Appeals of Maryland at 41. (Emphasis added).

tional Statement, No. 77-47, at 21). Appellants' contention, freely translated, stands for the proposition that Section 2(b) of the Robinson-Patman Act permits a seller to discriminate in price among its captive customers in order to enable those customers to meet *their* competition. Appellees submit that such an interpretation is completely unsupported by the clear and unequivocal legislative history of Section 2(b) of the Robinson-Patman Act, totally beyond the specific Congressional purposes and objectives of that proviso, and contrary to the two major decisions of this Court interpreting that legislative history. *Standard Oil Co. v. FTC,* 340 U.S. 231, 242, 249-50 (1951); *FTC v. Sun Oil Company,* 371 U.S. 505, 515-17 (1963). *See, also,* S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936). These decisions are not easily upset because, as this Court noted recently in *Illinois Brick Company v. Illinois,* 97 S. Ct. 2061, 2070 (1977), "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."

In construing Paragraph (D) so as not to impinge upon the Section 2(b) defense, the court below proceeded, as did this Court in *FTC v. A.E. Staley Mfg. Co.,* 324 U.S. 746 (1945), and *Standard Oil Co. v. FTC, supra,* "upon the assumption . . . that if a competitor's 'lower price' is a lawful individual price *offered to any of the seller's customers,* then the seller is protected, under § 2(b). . . ." 340 U.S. at 244 (emphasis added). By confining Paragraph (D) to conform to this assumption, the court below left completely intact a seller's Section 2(b) right "to retain a customer by realistically meeting in good faith the price offered to *that* customer, without necessarily changing the seller's price to its other customers." 340 U.S. at 250 (emphasis added).

The central core of this assumption is, of course, that the seller and his competitor sell to or solicit the same customer. Through this assumption of a "shared customer," emphasis is placed upon "individual competitive situations, rather than upon a *general system of competition.*" *FTC v. Staley Mfg. Co.,* 324 U.S. at 753 (emphasis added). Simply stated, if the existence of a "shared customer" to which a lower price has been offered by a competitor is not a necessary element of the Section 2(b) defense then, with the sole exception of proscribing the discriminatory undercutting of competition, Section 2(b) did not narrow the earlier "meeting competition defense" contained in former Section 2 of the Clayton Act. 38 Stat. 730. Such a conclusion, however, would be totally contrary to the prior decisions of the Court in interpreting the Congressional purposes and objectives in enacting Section 2(b). *See, Standard Oil,* 340 U.S. at 242; *Sun Oil,* 371 U.S. at 515-17.

In *FTC v. Sun Oil Company,* 371 U.S. 505 (1963), the Court was presented by Respondent Sun with a theory that the requirement of having a "shared customer," so that there would be a price which could be met, was satisfied by looking beyond the oil company's immediate customers (the independent dealers) to the ultimate customers (the consumers). This "conduit theory," conjured up to accomodate the exclusive dealing practices of major oil companies, would have created the legal fiction that the consumer, rather than the dealer, is the "shared customer." The Court expressly rejected the "conduit theory" because it was designed to overlook the existence of those persons the Robinson-Patman Act was enacted to protect, specifically, the small, independent businessman. 371 U.S. at 524-25. Although the Court noted that it was not required to pass upon the FTC's assertion that a lower price offered to Sun's dealer by Sun's purported

competitor "was a prerequisite to Sun's invocation of the § 2(b) defense," 371 U.S. at 529 n.19, nothing contained in the rationale of the Court's opinion would imply that the basic "shared customer" assumption of *Staley* and *Standard Oil* might be eliminated to accommodate the oil industry.

Appellants' argument that the decision below conflicts with a substantial body of federal authority is far from compelling. A careful reading of the lower federal court cases cited by appellants in support of this argument shows that they are either inapposite or unpersuasive.[18] Consequently, appellants have attempted to find conflicting federal authority in the form of federal agency reports (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 18-19; Shell Jurisdictional Statement, No. 77-11, at 15-17; and Gulf Jurisdictional Statement, No. 77-47, at 22-23) which, at best, are merely variant "statements of policy." These agency reports are in general conflict with the legislative history of Section 2(b) of the Robinson-Patman Act, and cases of this Court interpreting it. *See,* Note, *Gasoline Marketing and the Robinson-Patman Act,* 82 YALE L.J. 1706 (1973). At a minimum, these ephemeral policy statements are incapable of invalidating the constitutionality of a state statute or rewriting federal legislative history.

[18] With perhaps one exception, Bunty v. Shell Oil Co., [1972] Trade Reg. Rep. (CCH) ¶ 74,252 (D. Nev.), (which is unclear as to whether the holding dealt with the availability of the § 2(b) defense to Shell, or rather the plaintiff's failure to demonstrate a substantial lessening of competition), none of the cases cited by appellants pertains to the issue they seek to raise on this appeal. For example, the *disposition* of the case Bargain Car Wash, Inc. v. Standard Oil (Indiana), 466 F.2d 1163, 1176 (7th Cir. 1972) did not deal with the availability of the § 2(b) defense. The court held that the case was to be remanded for a factual determination of the competitive effects of the oil companies' price support program upon individual dealers without which the court could not intelligently reach the § 2(b) question. The 7th Circuit's comments pertaining to § 2(b) are, therefore, dicta, not holding. *See, also,* Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied,* 408 U.S. 928 (1972) (plaintiff's Robinson-Patman claim was dismissed for failure to meet the "in-commerce" requirement); Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973) (involved alleged horizontal and vertical price fixing and illegal tying; comments on § 2(b) are clearly dicta); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) (appeal related solely to lower court's ruling on motions to quash subpoenas *duces tecum* pertaining to discovery from non-party witnesses).

2. Compliance with Paragraph (D) of the Maryland Act does not expose appellants to liability for primary-level injury under Section 2(a) of the Robinson-Patman Act.

Appellant Shell raises a secondary proposition, specifically, that compliance with Paragraph (D) of the Maryland Act will subject it to liability for primary-level injury under Section 2(a) of the Robinson-Patman Act. (Shell Jurisdictional Statement, No. 77-11, at 18-21). Shell ignores the fact that a basic prerequisite to the existence of primary-level injury is the opportunity of the price discriminating seller to make sales to an existing customer of the seller claiming injury.[19] *Bolick-Gillman Company v. Continental Baking Company,*

[19] Shell's reliance on FTC v. Anheuser-Busch, Inc., 363 U.S. 563 (1960) is misplaced. In *Anheuser-Busch,* the defendant was competing with other beer manufacturers for the business of the same customers, *i.e.,* wholesale beer distributors in the St. Louis market. As Shell correctly states, the Court ruled that the absence of secondary-level injury (between the wholesale beer distributors) did not preclude a primary-level injury case under § 2(a) if the requisite injury to primary-level competition resulted. What Shell mistakes is that the primary-level injury which could have resulted in *Anheuser-Busch, i.e.,* a competitor manufacturer's loss of sales to a wholesale beer distributor who was purchasing instead from the price discriminating defendant, *cannot* occur where the price discriminating manufacturer, as in this case, has no competitors for sales to his immediate customers.

278 F.2d 649 (9th Cir. 1960). Paragraph (D) only applies to "voluntary allowances" which, as construed by the Maryland Court of Appeals (App. A, 35a, 40a), involve sales by a supplier to its dealer customers which do not give rise to the factual situation necessary for a finding of Section 2(a) liability, *i.e.* the opportunity of the price discriminating seller to make sales to or solicit an existing customer of the seller claiming injury.[20] In short, Paragraph (D) does not regulate the situation where a price reduction is offered by a supplier to its dealer customer to meet the equally low price offered to that same dealer customer by a competing supplier. (App. A, 40a).

For the purposes of a primary-level violation of Section 2(a), the appellants simply are not "competitors" for the sales regulated by Paragraph (D) unless the Court now adopts the conduit theory which it specifically rejected in *FTC v. Sun Oil Co.*, 371 U.S. at 524-25. It is axiomatic that the "shared customer" necessary to invoke the Section 2(b) defense is also necessary to establish Section 2(a) primary-level liability. The granting of a "voluntary allowance" within the meaning of Paragraph (D) cannot result in primary-level injury because the branded retail service station dealer customer is an independent businessman who sets his own retail price. As there can be no guarantee that the dealer will pass on his "voluntary allowance" to the consumer in the form of a lower price, lost sales by a *different* supplier to its branded dealer customers cannot be assumed. Only if such a guarantee were imposed as a prerequisite to the granting of a voluntary allowance by a supplier to his dealer (*i.e.*, that the dealer pass on the price reduction) might the causal

[20] Competition by suppliers for sales to the *same* dealer customers was not even suggested in the proceedings below. (App. A, 40a).

nexus for a primary-level injury exist.[21] Such an eventuality is, however, resale price fixing. *Bolick-Gillman,* 278 F.2d at 159; *Sun Oil,* 371 U.S. at 524 n.14.

In summary, the Court of Appeals of Maryland was clearly correct in concluding that Paragraph (D) neither impinged upon the Section 2(b) defense nor exposed the appellants to Section 2(a) liability for primary-level injury.

[21] Four appellants concede that it would be illegal to seek to control in any way their respective dealer customers' retail prices. (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 9; Continental Oil Company, et al. Jurisdictional Statement, No. 77-12, at 9). Consequently, as no control whatsoever is exercised by the suppliers over the pricing policies and decisions of their respective dealer customers, any "competitive pressure" at the dealer customer level resulting from lower retail prices can be attributed only to the independent pricing decisions of the dealer customers. For the purposes of the Robinson-Patman Act the supplier and his dealer customer are two different, non-competing sellers (the supplier selling at wholesale, and the dealer customer selling at retail) and the ultimate, unilateral decision of the dealer customer concerning his retail price (and any injury to competition caused thereby) simply *cannot* be attributed to his supplier. *See,* Purolator Products, Inc. v. FTC, 352 F.2d 874, 883 (7th Cir.), *cert. denied,* 382 U.S. 923 (1965); Hiram Walker, Inc. v, A.&S. Tropical, Inc., 407 F.2d 4, 6-8 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the Court of Appeals of Maryland affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

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(See inside cover for Counsel)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

BRIEF OF APPELLANTS

Appellants Exxon Corporation ("Exxon"), Phillips Petroleum Company ("Phillips"), Shell Oil Company ("Shell") and Gulf Oil Corporation ("Gulf"), appeal from the judgment of the Court of Appeals of Maryland, upholding the validity of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland, 1975. The judgment of the Maryland Court of Appeals was a consolidated ruling on the appeals of Exxon, Phillips, Shell, Gulf, Continental Oil Company ("Continen-

tal"), and its subsidiary Kayo Oil Company ("Kayo"), Ashland Oil Inc. ("Ashland"), and Commonwealth Oil Refining Company, Inc. ("Commonwealth") and its subsidiary Petroleum Marketing Corporation ("PMC"). Separate appeals and jurisdictional statements were filed by Exxon and Phillips (77-10); Shell (77-11); Continental and Kayo (77-12); Gulf (77-47); and Ashland, Commonwealth and PMC (77-64). Probable jurisdiction was noted on October 3, 1977, and the separate appeals were consolidated. A separate brief is being filed by Continental and Kayo in 77-12, and by Ashland, Commonwealth and PMC in 77-64.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland contains the judgment of that court which reverses the judgments of the Circuit Court for Anne Arundel County. The opinion is officially reported at 279 Md. 410 (advance reports) and unofficially at 370 A.2d 1102. The supplemental opinion of the Court of Appeals on motions for reconsideration and stay of judgment is reported at 279 Md. 456 (advance reports) and unofficially at 372 A.2d 237. The Circuit Court for Anne Arundel County filed two opinions, neither of which has been officially reported. Copies of all four opinions are contained in the Joint Appendix to Jurisdictional Statements, as appendices A (1a-44a), B (45a-48a), C (49a-51a) and D (53a-134a), respectively.[1]

JURISDICTION

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2) (1970). Probable jurisdiction of the Court over these appeals was noted on October 3, 1977.

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[1] References herein to the Joint Appendix to Jurisdictional Statements are cited, *e.g.* (J.A. 45a); references to the Appendix filed herewith are cited, *e.g.* (A. 45).

STATUTES INVOLVED

Chapter 854, Laws of Maryland 1974, was amended by Chapter 608, Laws of Maryland 1975, and codified in the Maryland Annotated Code (1957), Art. 56, § 157E (Vol. 5B, pp. 53, Supp. 1977). These chapters ("the Act" or "the Maryland Act") added the following provisions to the Motor Fuel Inspection Law:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(The italicized provisions are those added by Chapter 608 of the Laws of 1975).

The pertinent provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (1970), (sometimes hereinafter referred to as Section 2 of the Robinson-Patman Act), are as follows:

> § 2(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .
>
> (b). Provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Other pertinent provisions of Maryland law will be found in Appendix F to the Joint Appendix to Jurisdictional Statements (J.A. 155a-64a).

QUESTIONS PRESENTED

1. Whether Paragraphs (B) and (C) of the Maryland Act, which flatly prohibit the operation of retail service stations within the State of Maryland by producers or refiners of petroleum products, constitute an unlawful discrimination against or an undue burden on interstate

commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Paragraph (D) of the Maryland Act, which requires statewide uniform voluntary allowances, is in conflict with the Robinson-Patman Act and thus void under the Supremacy Clause of the United States Constitution where compliance with both Paragraph (D) and the federal act is impossible for a supplier of petroleum products in Maryland and where Paragraph (D) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Robinson-Patman Act.

3. Whether Paragraph (D) of the Maryland Act constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

A. The Proceedings Below.

The federal questions presented by these appeals were first raised in appellants' bills of complaint filed in the Circuit Court for Anne Arundel County, Maryland. Defendants in all cases were state officials charged with enforcement of the Act.[2] In their complaints, Exxon, Shell, Gulf and Phillips challenged the constitutionality of Paragraphs (B) and (C) of the Act as constituting, *inter alia*, a discrimination against and an undue burden

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[2] Appellants Exxon, Gulf, and Phillips have raised as questions presented for appeal, the first and second questions; appellant Shell has raised only the second question. Subsequent to the time Shell filed its bill of complaint, its one company-operated station in Maryland became dealer operated, and consequently Shell has not raised in this appeal the first question presented. Nevertheless, Shell adheres to its position that the Maryland Act's prohibition on the operation of retail service stations by producers and refineries of petroleum products is unconstitutional. The third question is raised by Gulf.

on interstate commerce. They also challenged the "voluntary allowance" provisions of Paragraph (D) as being in conflict with the Robinson-Patman Act.[3] (A. 16, 22-23, 65, 72-73, 74, 91, 100-01, 118, 120, 124).

On May 29, and June 19, 1975, Shell, Exxon and Gulf filed motions for partial summary judgment seeking, *inter alia*, a declaration that by requiring a supplier "to extend all voluntary allowances uniformly to all retail service station dealers supplied," rather than permitting a supplier to limit such allowances to individual competitive situations, Paragraph (D) was in conflict with the Robinson-Patman Act. (A. 153-55, 156-57, 161-62). In a Memorandum opinion dated October 14, 1975, the trial court granted plaintiffs' motions, holding Paragraph (D) in irreconcilable conflict with the Robinson-Patman Act. (J.A. 49a-51a). The court stated:

> Literal enforcement of paragraph D in matters of price allowances would place the plaintiffs in jeopardy of violation of the Robinson-Patman Act passed by the Congress of the United States in 1936 in an attempt to foster fair competition in interstate commerce.
>
> * * * *
>
> Moreover, paragraph D would have the effect of depriving the plaintiffs in Maryland of the absolute defense afforded them by subsection 2(b) of 15 US Code §§ 13-13B, 21a (1952) when plaintiffs are alleged to have discriminated in price between different purchasers of commodities of like grade and quality.
>
> * * * *
>
> This court finds that the risk of conflict in attempted compliance by the plaintiffs with paragraph D is all apparent, and that this paragraph would, of necessity, foster the lack of lawful competition within the State to the detriment of the consumer. It therefore finds that in obstructing the accomplishment and execution of the full purposes and objectives of an Act of Congress of the United States paragraph D is invalid under the preemption doctrine. *Hines* v. *Davidowitz*, 312 U.S. 52. (J.A. 50a-51a).

[3] Gulf also challenged Paragraph (D) on the additional ground that it constituted an undue burden on interstate commerce.

The case thereafter went to trial on the other issues. On January 27, 1976, the Circuit Court entered judgment for the plaintiffs (J.A. 134a), holding Paragraphs (B) and (C) to be unconstitutional on a number of grounds, although rejecting plaintiffs' contention that those provisions unduly burdened interstate commerce (J.A. 123a). The court reaffirmed its conclusion that Paragraph (D) was invalid in the light of the Robinson-Patman Act. Although the contention that Paragraph (D) violates the Commerce Clause was raised in appellants' bills of complaint, the trial court did not decide this issue since it was not required to do so in view of its ruling that Paragraph (D) conflicted with the Robinson-Patman Act. Pursuant to Maryland procedure, the Maryland Court of Appeals also did not decide this issue.[4]

On defendants' appeal to the Court of Appeals of Maryland, plaintiffs below renewed the constitutional arguments presented to the trial court. The Court of Appeals reversed the judgment of the Circuit Court, holding that all provisions of the Act were constitutional. In particular, the court rejected plaintiffs' contention that Paragraphs (B) and (C) violated the Commerce Clause and that Paragraph (D) was in conflict with the Robinson-Patman Act.

On March 17 and 18, 1977, and pursuant to Rule 850, Maryland Rules of Procedure, plaintiffs filed with the

[4] Maryland Rule of Procedure 885 states in part: "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried *and decided* by the circuit court . . . ." (Emphasis added). *Rippon* v. *Mercantile-Safe Deposit & Trust Co.*, 213 Md. 215, 222, 131 A.2d 695, 698 (1957).

Maryland Court of Appeals a timely Motion for Stay of Mandate and a Motion for Reconsideration.

On April 13, 1977, the Court of Appeals denied plaintiffs' Motions for Reconsideration and Stay of Mandate, and issued its mandate. (J.A. 45a). Plaintiffs filed timely notices of appeal with the Clerk of the Circuit Court for Anne Arundel County, Maryland. (J.A. 143a-54a). On July 1 and 8, 1977, plaintiffs docketed their appeals in this Court. On October 3, 1977, this Court noted probable jurisdiction of the appeals.

B. Facts Relating to the Commerce Clause Issue.

1. *The origin of petrolcum products sold in Maryland.*

No crude oil is produced or refined[5] into motor fuel in the State of Maryland. (J.A. 19a). Consequently, all motor fuel sold in Maryland is produced and refined outside of Maryland and transported into the State by pipeline, vessel or truck. (A. 194, 212, 214, 216, 223-24, 231, 255, 258). Motor fuel which enters the State is delivered either to storage tanks located in Maryland and from there to retail service stations, or directly to retail service stations.

2. *The retail marketing of petroleum products in Maryland.*

As the trial court found, the State readily conceded, and the Court of Appeals recognized, "the retail marketing of petroleum products in the State of Maryland is a highly competitive industry." (J.A. 99a, State's Brief in the Court of Appeals at 7, and J.A. 13a). In Maryland, petroleum products are purchased at retail by local consumers, by interstate travellers and by trucking and other transportation companies engaged in interstate commerce. (A. 196, 228-29).

[5] Since all the producing companies which operate service stations in Maryland are also refiners, hereinafter "producers and refiners" are sometimes referred to simply as "refiners."

There are two basic categories of retail service stations—major brand and private brand. Major brand stations are characterized by an advertised brand name and the sale of advertised brand name products, the availability of repair services, and the acceptance of credit cards.[6] (A. 306, 355). The overwhelming majority of major brand stations have been and are operated by independent dealers. (J.A. 99a). Private brand stations offer products bearing a brand name which is not widely advertised, offer limited or no repair services, accept no credit cards, and normally sell motor fuels at prices below those of major brand stations. (J.A. 98a-99a; A. 349-56, 452, 506-07, 516-17). The vast majority of private brand stations are company-operated. (J.A. 99a). The term company-operated means operated by a company with its own employees and under its own brand name.

As of July 1, 1974 there were approximately 3,800 retail service stations in Maryland. Of these stations, approximately 245, or six percent, were company-operated. Twenty-one different refiners sold motor fuels at retail through 209 of these company-operated stations (124 by major oil companies and 85 by non-major companies). (A. 190-91).[7] Appellant Exxon, as of July 1, 1974, had 532 retail outlets in Maryland of which 36 were company-operated (A. 196); Shell, as of September 4, 1975, had 194 of which only one was company-operated (A. 664); Gulf, as of September 1975, had 219 retail outlets of which only one was company-operated (A. 226); and Phillips, as of October 1, 1975, had 121 of which 13 were company-operated (A. 234). The relatively small percentage of company-operated stations

[6] With the growth of self-service stations over the last few years, some major brand stations are selling motor fuel on a partial or full "self-serve" basis. (A. 217, 317-18, 646-47).

[7] The designation of "major" and "non-major" companies is that of the Lundberg Survey, Inc., a widely used industry statistical organization. (A. 376). The remainder of the company-operated stations were operated by independent marketers which neither produce nor refine petroleum products. (A. 190-91).

in Maryland generally mirrors the percentage nationwide.[9]

3. ***Producers and refiners and their relationship to retail service station operations.***

There are also two basic categories of "producers and refiners"—major oil companies such as appellants Exxon, Shell, Gulf and Phillips, and independent oil companies such as appellants Commonwealth and Ashland.

The major oil companies are fully integrated, that is they produce, refine, transport and market petroleum products primarily through major brand stations operated by independent dealers. (J.A. 3a-4a). Some majors such as Exxon and Phillips also market petroleum products through a limited number of private brand stations. These private brand stations of the majors (such as Exxon's "Alert" and Phillips' "Way-Lo" brand) are company-operated. (A. 248-49, 313). In addition, Kayo, a subsidiary of Continental, engages solely in retail marketing of motor fuels in 18 eastern states through directly operated stations which offer motor fuel for sale at prices lower than those at major brand stations. Continental does not operate any service stations or sell its branded motor fuels ("Conoco") in Maryland. (A. 212, 348, 355-56).

Some of the major oil companies market petroleum products through a limited number of special types of service stations. Exxon, for example, has developed "Car Care Centers" which provide for comprehensive maintenance and repair of cars in addition to the sale of petroleum products (A. 197-98, 308-10); Gulf has developed "Tire Huts" which specialize in the sale of tires in addition to the sale of petroleum products (A. 648); and Shell has developed "Self Repair Centers" (A. 485, 666).[9]

[8] The record in this case shows, for example, that as of December 31, 1973, of 25,000 Exxon branded stations nationwide, approximately four percent were company-operated. (A. 197).

[9] While the picture presented in the record is, of necessity, a static one, and the overall outlines set forth herein are still valid, the service station industry continues to evolve. The growth of self-service and limited service outlets is an example of the evolutionary process. (A. 374, 407-08, 646-47).

Independent oil companies are partially integrated, that is, they engage only in refining and marketing, *e.g.*, Commonwealth, or they refine, market and engage in an insignificant amount of crude oil production in relation to their refining capacity, *e.g.*, Ashland. (J.A. 4a; A. 255-57). Apart from some dealer stations geographically close to Ashland's headquarters in Ashland, Kentucky which use the Ashland brand name, Ashland and Commonwealth market exclusively through lower priced, company-operated private brand stations.[10] (A. 449-50, 502-03).

4. ***Competitive importance of private brand operations.***

There are several reasons why the retail marketing of petroleum products in Maryland is "highly competitive," including: the large number of stations, the mobility of the consumer at the time of purchase, the availability of price information and the relatively small capital investment required to open a station. (J.A. 99a; A. 432-33, 473-74). The existence of lower priced, high volume, private brand stations, such as Kayo, Scot and others, as an alternative to major brand, full service stations, is also an important competitive factor, particularly since the private brand station competes principally on price, and not on service, brand image, or widespread brand availability. (A. 370-71).

The evidence clearly establishes that a critical factor in the successful operation of a private brand station is direct operation by the company through its own employees. (A. 357, 450, 454-55, 503-04, 508, 517). This is true for refiner-marketers, as well as for independent marketers, whether large or small. (*Id.*). Private brand

[10] Ashland markets under various names including "Bi-Lo," "Hi-Fi," "Payless" and "Red Head," and Commonwealth, through its subsidiary PMC, markets under the name "Scot." (A. 190-91).

marketing through dealers has been tried unsuccessfully by both refiner-marketers and independent marketers. (A. 450, 508, 517-18). One of the principal reasons is the need of the private brand marketer to control the price of the products sold. (A. 357, 450, 503, 517). Such control of the price can only be accomplished legally through stations operated by the marketers' own employees. (A. 454-55). *See Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). It cannot be accomplished through independent dealers. The testimony of witnesses on behalf of Ashland, Commonwealth and Kayo, which operate exclusively through company-operated stations in Maryland, is that they would have to abandon the sale of petroleum products at retail in the Maryland market if they could not operate their own stations. (A. 357-58, 457, 508). Since the vast majority of private brand stations are company-operated, the prohibition on company operation contained in Paragraphs (B) and (C) of the Maryland Act would make it economically infeasible for refiners marketing through private brand stations to continue marketing operations in Maryland.[11] The result would be to shut off interstate shipments from outside Maryland to these stations in Maryland. (A. 508).

In addition, the direct operational control allowed through use of company-operated stations is a practical necessity today for any marketer, large or small, major brand or private brand, seeking to enter a market where

[11] In reversing the trial court, the Maryland Court of Appeals noted that as to some of these operators no final corporate board decision had been made to withdraw from the Maryland retail market if the Act became effective. From this fact, the court drew the conclusion that it might still be possible for these private brand operators to sell their products to the public in Maryland through independent dealers. (J.A. 23a-24a). This conclusion was, however, contrary to the undisputed testimony that such marketers could not operate profitably in this manner. (J.A. 103a, 109a, 111a; A. 357-58, 360, 457-58, 508).

it has little or no brand recognition.[12] (A. 376-78). Exxon's experience entering the Florida market in 1962 is illustrative:

> [Florida] was a market that we'd never been in prior to 1962. We were unknown in the market at that time. We had no brand image. We were unable to attract dealers. Stores were unable to provide sufficient income to the dealer so Exxon elected to operate those stores on a company operated basis until such time we could build a volume through proper operation to the point that the dealer could make a living and at that time the stores were leased to dealers. . . . This was some five or six years later. . . . I would think less than five per cent are company operated at this time. (A. 317-18).

Other uses and benefits of company operation include enabling the refiner-marketer to observe directly the wants and needs of the consumer (A. 315, 649), to enhance brand acceptance by company participation in the full range of retail offerings, thereby benefiting all the company's branded dealers (A. 316), to engage in controlled experimentation as to differing gasoline marketing techniques (A. 205-09, 316-18, 381-82, 648, 665-67), to provide on-the-job training for dealers and company employees (A. 318, 670), to enable a supplier to fill a temporary need, as where a dealer unexpectedly vacates a station (A. 318-19, 669), to remedy consumer complaints (A. 319), and to obtain a retail profit (A. 316).

[12] While it cannot be said that a well-financed major brand company cannot under any circumstances expand into a new market without company operation, as both a practical and legal matter, the use of company operations greatly facilitates expansion into new markets. Conversely, the prohibition of company operation greatly burdens it.

5. ***Effect of Paragraphs (B) and (C) of the Maryland Act on the interstate operations of independent (partially-integrated) oil companies, major (fully-integrated) oil companies and non-integrated private brand marketers.***

Because of the important and diverse roles company-operated stations serve in the marketing activity of refiners, the Maryland Act's total ban on their use by producers and refiners has predictable adverse consequences on the various segments of the petroleum industry.

(*a*) Because private brand partially integrated companies, such as Ashland, Commonwealth and Hudson Oil Company, unlike the more fully integrated oil companies, cannot as a matter of industry economics adopt the dealer distribution method which the Act requires, they will be obliged to discontinue business in the State if the Act is upheld. (A. 357-58, 360, 457-58, 508). The Act, therefore, has the effect of forcing existing aggressive interstate competitors out of the Maryland market.

(*b*) For these partially integrated companies, such as Ashland and Commonwealth, company operations permit cost efficiencies resulting from integrating marketing with refining activities. The efficiencies result from the ability to maintain an assured flow of product from the refinery, thereby permitting refineries to be run at maximum levels. Maximum refinery runs are translated into lower average costs, and ultimately lower wholesale and retail petroleum product prices. Because of the capital intensive nature of a refinery operation, it is critical from an economic standpoint to have the refinery operating at peak levels. (A. 504-05, 531). This is accomplished for partially integrated companies in part through a controlled marketing arm for the refined products. (A. 531). For these companies, such as Ashland and Commonwealth, which market through company-operated

stations, these stations serve as the assured outlets. (A. 504, 531). For major oil companies such as Exxon, Shell and Gulf which market largely through independent dealers, the dealers serve as the principal outlet for petroleum products from the refineries.

(*c*) Another consequences of the loss of company-operated outlets in Maryland by companies like Ashland and Commonwealth is the adverse effect on the supply of petroleum products available to the wholesale market. Ashland, for example, is one of the principal sources of petroleum products for private brand independent marketers in Maryland. (A. 509, 623-24). Ashland uses its retail outlets to balance wholesale sales, which fluctuate greatly as wholesale prices vary. (A. 509). This balance must be maintained in order to operate at all in the State, because Ashland can only supply its Maryland customers by means of exchange agreements with other oil companies that deliver petroleum products directly into the State, and such exchange agreements cannot be maintained unless both parties are able to exchange products on a regular basis. (A. 509-10). Since it would be difficult for Ashland to remain in Maryland as a wholesaler if it lost its retail outlets, a likely result would be a diversion of its wholesale activities into other states. (A. 509). This would have an adverse effect upon independent gasoline marketers which are supplied at wholesale by Ashland.

(*d*) Because company-operated stations are essential for the private brand marketing of gasoline by partially integrated refiners, another effect of the Act is to preclude other partially integrated refiners marketing in other states from ever entering the Maryland market. Under a widely employed industry classification, there are 37 partially integrated refiners, five of which are currently represented in Maryland—Ashland, Commonwealth, Crown Central Petroleum Co., Amerada Hess Corporation and Tenneco Oil Company. (A. 376). The uncontradicted

evidence established that by prohibiting company operations by producers or refiners, the Act would effectively prevent the remaining 32 interstate competitors from entering the Maryland retail market (A. 376-77, 412), as the trial court found. (J.A. 130a).

(*e*) Because independent marketers sell their products predominantly through company-operated outlets, the effect of the Act is to prohibit independent marketers now operating in Maryland from strengthening their businesses by integrating backward into refining while still maintaining their stations in Maryland. The effect upon Hudson Oil Company, an aggressive, totally company-operated non-integrated marketer which sells its gasoline in 36 states including Maryland, is illustrative. (A. 516). At trial, the president of Hudson testified that the company planned to construct or acquire a refinery to provide the company with its own source of refined product. (A. 518). Subsequent to trial, Hudson did acquire a refinery and is now subject to the Act.[13] Now that Hudson has strengthened its competitive posture by integrating backward, the Act, if upheld, will require it to abandon its stations in Maryland. (J.A. 122a; A. 519).

(*f*) An absolute ban on company-operated stations will also adversely affect the major oil companies. The statute will effectively preclude the major oil companies from engaging in private brand low price marketing for the same reason it precludes partially integrated refiners from so doing, *i.e.*, an inability to establish individual retail prices. Moreover, the Act will adversely affect the major oil companies' dealer operations. The Act will eliminate the opportunities to observe directly the needs of the consumer, to enhance brand acceptance by engaging in competition in an extensive range of automotive repair

[13] Oil & Gas Journal, Annual Refinery Issue at 117 (March 28, 1977).

services and parts for the benefit of branded dealers, to test innovations and marketing methods and equipment, to provide on-the-job training for dealers and to remedy consumer complaints. (A. 205-09, 316-19, 381-82, 648-49, 665-70).

(*g*) The total ban on company operations by producers or refiners will interfere with the flow of petroleum products into Maryland from out of state and will cause a diversion of capital from Maryland to other states. (A. 383). The evidence made clear that at least some of the partially integrated refiners will be forced to close their stations if the Act is upheld. To the extent they do so, the flow of petroleum products from out of state to these stations will be diverted to other stations in Maryland or elsewhere. (A. 508). In addition, capital which would be invested in certain types of stations to be operated by refiners, will be channeled elsewhere. (A. 317, 320).

C. Facts Relating to the Robinson-Patman Act Issue.

Appellants sell gasoline and other petroleum products in interstate commerce to branded retail service station dealers in Maryland, who either lease the station from an appellant or third party or own the facility themselves. (J.A. 58a, 73a, 79a, 84a). Appellants grant temporary price reductions, or "competitive' or '"voluntary" allowances, to their branded retail dealers in order to provide competitive and equitable assistance in gasoline prices to those dealers injured by local competitive gasoline price reductions of competing retailers which are subsidized by their suppliers.[14]

[14] The facts contained in this discussion of voluntary competitive allowances are taken from the affidavit of Walter D. Naughton, Marketing Manager for Shell in the Southeast area of the United States submitted by Shell prior to trial on all issues. In a letter to the Honorable Eugene M. Childs, trial judge, counsel for Shell and counsel for defendants stipulated to the Naughton affidavit as

A competitive allowance is intended for use when a supplier's branded dealers suffer financial injury, in terms of loss of customers, reduced unit profit, or both, because a competing supplier lowers its price to its retail dealers. By meeting its competition through reduced product cost to its dealers, a supplier enables its dealers to remain competitive and thus retain the business of their customers.[15] (A. 671). Shell, like the other appellants, will grant a competitive allowance after it determines that such an allowance to Shell dealers is necessary to meet the equally low price of a supplier(s) in competition with Shell on the same functional level. Shell will not grant a competitive allowance to a dealer facing a lower retail price of a competing brand sold by a competing dealer *unless* that lower retail price *is financed by the competing dealer's wholesale supplier—a competitor of Shell.* (A. 673-74).

In authorizing competitive allowances to affected dealers, appellants utilize basic geographic areas called "trade" or "trading" areas. A trade area is a small specific geographic area in which competitive marketing conditions are substantially the same. All service stations within a trade area have exposure to substantially the same customers and therefore the ability to compete with one another on a relatively equal basis. There are one or more, usually several, service stations in each trade area. The areas may be of various sizes with the smaller ones generally in the more densely populated metropolitan dis-

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evidence. (A. 658). This affidavit incorporates virtually verbatim a previous Naughton affidavit submitted in support of Shell's motion for partial summary judgment directed to Paragraph (D). (A. 157). As a matter of convenience, reference herein is to the subsequent longer affidavit agreed to by the parties.

[15] When Shell or other appellant grants an allowance it does not, directly or indirectly, secure the dealer's agreement that the allowance will be reflected in a lower retail price. Whether the dealer will reflect the lower cost by reducing the retail price is a decision solely within the dealer's discretion. (A. 674-75).

tricts where the customer potential is concentrated; larger ones are more characteristic of less populous areas or corridors along heavily traveled arterials where commuter or transient travel is heavy over considerable distances. A metropolitan area normally would be comprised of a number of trade areas. Decisions with respect to appellants' geographic delineation of competitive trade areas are based on such factors as physical barriers, population distribution and the location of the retail stations of competing brands. In a particular "price war" situation factors such as the amount and duration of the price difference are given consideration. (A. 671-73).

Like other appellants, if Shell grants a competitive allowance to a dealer, it is Shell's policy to offer an equal allowance to all Shell dealers in the same trade area. To the extent necessary to avoid competitive injury, allowances in appropriate competitive amounts are also given to Shell dealers in adjoining trade areas. The amount of such allowances decreases as the distance from the trade area increases. (A. 674).

The application of Paragraph (D) to competitive allowances granted by appellants is clear and undisputed. Whenever an appellant responds to competitive pressures from a competing supplier(s) and grants a competitive allowance to any dealer located in Maryland, Paragraph (D) expressly requires appellant to extend the same competitive allowance uniformly to all other dealers located throughout Maryland. Such an extension is required notwithstanding the fact that the particular competitive situation may be confined to a single or small number of trade areas.

SUMMARY OF ARGUMENT

I. Paragraphs (B) and (C) of the Maryland Act are Invalid Under the Commerce Clause.

The facts set forth in the Statement of the Case show that interstate commerce will be both discriminated against and unduly burdened by the prohibition contained in Paragraphs (B) and (C) of the Act against the operation of service stations by producers and refiners, the products of which are all produced and refined outside of Maryland and shipped into the State.

All producers and refiners, large or small, major brand or private brand, are barred from the Maryland retail market by reason of the nature of their out-of-state activity. The practical effect is to impede any refiners not currently marketing their products in Maryland from entering the Maryland market, and to exclude from the market the independent or smaller, and usually private brand refiners now there, such as appellants Ashland and Commonwealth as well as refiner-marketers such as Hudson Oil Company which the evidence shows can remain competitive only by selling at lower prices through company-operated stations.

The Act clearly requires that stations be operated by retail dealers, and its purpose was unquestionably to benefit local dealers at the expense of the refiners which compete with them. The 1975 Amendment to the Act which provides that

> [t]he station must be operated by a retail service station dealer

is unmistakable evidence of the Act's purpose to protect local dealers from the competition of refiners operating in interstate commerce. This discriminatory purpose and effect condemn the Act, almost *per se*, and, in any case, where, as here, reasonable non-discriminatory alternatives

more clearly attuned to the accomplishment of the professed statutory objectives are available.

The Maryland prohibition against refiner-operated service stations has the effect of preventing refiners from shipping motor fuel to their present company-operated outlets or to any new ones. Further, as an economic matter, it bars from the State refiners which might desire to enter, and forces the existing independent refiners out of the State. It also precludes any non-integrated marketer which uses company-operated stations in Maryland from strengthening its competitive position in the petroleum industry by constructing or acquiring a refinery without being required to give up its stations in Maryland.

States may not impose such burdens on interstate commerce which clearly constitute interferences with the natural functioning of the interstate market. These burdens substantially outweigh the claimed advantages to local interests in the State which are claimed to be the need for fair allocation of fuel supplies in time of shortage, and the need to protect against diminution of competition. Both of these claimed local benefits can be, and in fact are, controlled by other legislation. Paragraph (F) of the Act mandates fair and equitable allocations of motor fuel supplies during a period of shortage. With producers and refiners operating only 209, or about 6 percent, of the approximately 3,800 stations in Maryland and with the trial court finding, the State conceding and the Court of Appeals recognizing that the sale of petroleum products in Maryland is "highly competitive," the local need to protect the competitive vigor of the retail petroleum market in Maryland (as opposed to protecting local dealers from out-of-state competition) with such draconian methods is slight indeed. Nor can there be doubt that the principal competitive effect of the statutory prohibition would be to eliminate the low-price com-

petition of the independent private brand refiner-operated stations.

The interrelationship between the operation of the retail market and of the refiners which supply it exemplifies the fact that the petroleum industry is highly complex and functions on a national scale. Its structure is of national, not local, concern, and such efforts at control by an individual state necessarily have the effect of unduly burdening interstate commerce.

II. Paragraph (D) of the Maryland Act is in Conflict with the Robinson-Patman Act.

Appellants' appeal with respect to Paragraph (D) of the Maryland Act, which requires uniform statewide voluntary allowances, presents a classic situation requiring the application and enforcement of the Supremacy Clause of the United States Constitution. Paragraph (D) must be struck down because it is in actual, direct and irreconcilable conflict with superior federal law—the Robinson-Patman Act. First, compliance with Paragraph (D) exposes a seller to potential liability under the Robinson-Patman Act. Second, Paragraph (D) frustrates the full effectiveness of the Congressional purposes underlying Sections 2(a) and 2(b) of the Robinson-Patman Act.

Section 2(b) of the Robinson-Patman Act requires that a seller's discriminatory price reductions granted to meet the equally low price of a competitor be limited to a specific competitive situation presented by the seller's own competitor. In contrast, under Paragraph (D) of the Maryland Act a supplier is required to extend a competitive allowance to all dealers in Maryland whenever it grants such an allowance to any dealer even though such an extension of the price reduction (and consequent price discrimination) could not be justified as responsive to the price reductions of a competitor.

In an effort to eliminate the conflict between Paragraph (D) of the State law and the Robinson-Patman Act, the Maryland Court of Appeals held that Section 2(b) of the federal law only protects price discriminations which result from a seller reducing its price to a particular purchaser that has received a lower price offer from the seller's competitor. The Maryland court's narrow reading of the meeting competition defense is contrary to the uniform position of the Department of Justice and the Federal Trade Commission, the federal agencies responsible for enforcement of the Robinson-Patman Act, and the construction given Section 2(b) by the lower federal courts. The agencies and the courts both have recognized that Section 2(b)'s "meeting the equally low price of a competitor defense" is a complete and absolute defense to price discrimination created when an appellant grants a "competitive allowance," whereby it reduces its price to its branded service station dealers to meet a price cut by a competing supplier to that supplier's dealers. The Maryland court rejected these authorities, thereby engrafting a debilitating and artificial limitation onto Section 2(b) which is directly at odds with the specific Congressional purposes embodied in Sections 2(a) and 2(b) as well as with the broad antitrust goal of fostering competition at all levels of distribution.

Properly construed, Section 2(b) sanctions price differences created by the granting of price reductions for the purpose of meeting the equally low price of a competitive supplier to that supplier's dealers. So construed, there is a [illegible]ld irreconcilable conflict between the Robinson-Patr[illegible]ct and Paragraph (D).

First, the Maryland court ignored the fact that the requirement of Paragraph (D) to extend a lower price beyond the area necessary to meet competition creates a price difference between prices charged in Maryland and prices charged elsewhere. Where the effect of the ex-

tension of the lower price "may be substantially to lessen competition," the price differences are *prima facie* violative of Section 2(a) of the Robinson-Patman Act and are not protected by Section 2(b) because the statewide lower price creates price differences which are not confined to the initial area necessitating the price reduction. Such statewide territorial price discrimination may cause competitive injury to competitors of the supplier (primary-line) or to the supplier's dealers (secondary-line) that are located across the Maryland state line and that compete with the supplier's dealers in Maryland. Accordingly, compliance with Paragraph (D) requires appellants to violate Section 2(a) of the Robinson-Patman Act without the protection of Section 2(b) and must be struck down on that ground.

Second, Paragraph (D) is inconsistent with and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting Sections 2(a) and 2(b). In enacting Sections 2(a) and 2(b), Congress intended to reconcile the policies of the Sherman Act and the Robinson-Patman Act by permitting price discriminations which would promote price flexibility and competition while prohibiting price discriminations which were destructive of competition. By requiring a seller to grant the same competitive allowance to all the seller's dealers in Maryland whenever the seller grants such an allowance to any dealer, Paragraph (D) eliminates the Section 2(b) defense, ignores the competitive injury requirement of Section 2(a) and disrupts the balance struck by Congress between the Sherman and Robinson-Patman Acts.

III. Paragraph (D) of the Maryland Act Is Invalid Under the Commerce Clause.

By effectively requiring a supplier to extend a voluntary allowance to all its Maryland dealers if it should grant an allowance to even one dealer located near

Maryland's border, the likelihood that a seller will grant an allowance to such non-Maryland dealers is greatly inhibited, if not totally eliminated. The Maryland Act thereby interferes with and impedes the natural functioning of interstate commerce. Further, the State has failed to justify Paragraph (D) in terms of proper local benefits and unavailability of less restrictive alternatives.

ARGUMENT

I. PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT, WHICH PROHIBIT PRODUCERS AND REFINERS FROM OPERATING SERVICE STATIONS IN MARYLAND, ARE INVALID UNDER THE COMMERCE CLAUSE.

Paragraphs (B) and (C) of the Maryland Act require all producers or refiners of petroleum products to cease operating all company-operated retail service stations in Maryland. Since there is no producing or refining in the State of Maryland, the practical effect of the statute is to eliminate altogether the competition of all interstate producers or refiners, both large and small, from the Maryland retail service station market and to require consumers to purchase substantially all their motor fuel requirements from local dealers. The record demonstrates that an important economic consequence of the Act is to bar from the Maryland market the independent private brand refiner-marketers which provide a substantial portion of the low-priced competition.

This Court has identified at least three ways that state legislation may violate the strictures of the Commerce Clause: (1) it may discriminate against interstate commerce; (2) it may unduly burden interstate commerce; or (3) it may deal with a subject which is by its very nature regional or national in scope and therefore not amenable to state regulation. Paragraphs

(B) and (C) transgress the Commerce Clause for all these reasons.

Where a state statute either on its face or in its "practical effect" does not regulate "evenhandedly" to carry out a legitimate local interest, but rather discriminates against interstate commerce, then this Court has said that "*the burden falls on the State* to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests at stake." *Hunt* v. *Washington State Apple Advertising Commission*, —— U.S. ——, 97 S. Ct. 2434, 2446 (1977) (emphasis supplied).

Where the only, the principal or the intended effect is to favor businessmen or operations in the home state over persons or activities outside the state, such laws have invariably been held invalid and may be said to be at least presumptively illegal, *per se*. *See, e.g., Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Toomer* v. *Witsell*, 334 U.S. 385 (1948); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Likewise, such an effect "on commerce has been declared to be virtually *per se* illegal," "[e]ven where the State" can be said to be "pursuing a clearly legitimate local interest." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

On the other hand, in the absence of any apparent discrimination against interstate commerce, where a state law which purports to regulate a "legitimate local public interest and its effects on interstate commerce are only incidental," this Court has employed the balancing test enunciated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142, and recently reaffirmed in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371 (1976).

It is submitted that the Act cannot stand under any of the foregoing tests, whether the Act is viewed as a

"discrimination" or a "burden." The injury to the free flow of interstate commerce is substantial, any local benefit is minimal, and in any event the latter can be and is adequately promoted by alternative measures having a lesser impact on interstate activities.

A. Paragraphs (B) and (C) of the Maryland Act Discriminate Against Interstate Commerce.

The effect of Paragraphs (B) and (C) of the Maryland Act is to create a protected enclave for Maryland independent dealers against competition from without the State by mandating the use of independent dealers to the exclusion of producers and refiners for the retail sale of petroleum products. Since motor fuel is neither produced nor refined in Maryland, it is only by reason of their out-of-state producing or refining activities that companies become ineligible to compete in the Maryland retail petroleum market. As a result, interstate marketers which own refineries are forced to surrender the stations they operate in Maryland and to abandon any plans they have for other stations. Potential entrants into the Maryland market which must at least start with company-operated stations, are denied entry. Also, nonintegrated marketers which employ company-operated stations and which in the future develop a refining capacity, will have to forfeit their Maryland stations.

It is clear that the protection of Maryland independent dealers was at least one, if not the main, object of the Maryland Legislature, as the 1975 amendments demonstrate. Paragraphs (B) and (C) of the original Act of 1974, which stated that producers and refiners could not open or operate retail service stations, were both amended in 1975 to add the unequivocal provision that

> [t]he station must be operated by a retail service station dealer.

This shows that it was the clear and specific intent of the Maryland Legislature that the Maryland dealers were to be the principal beneficiaries of the Act."[16] Thus the case at bar presents "the rare instance where a State artlessly discloses an avowed purpose to discriminate against interstate goods" to benefit local dealers. *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951); *Hunt* v. *Washington State Apple Advertising Commission*, 97 S. Ct. at 2445.

Even without regard to any direct manifestation to favor local dealers, the Maryland Act would nonetheless have a discriminatory effect. The Commerce Clause "forbids discrimination" against interstate commerce "whether forthright or ingenious." The issue is whether a state law "will in its practical operation work discrimination against interstate commerce." *Best & Co., Inc.* v. *Maxwell*, 311 U.S. 454, 455-56 (1940). Other authorities also establish that the "practical effect" of the state or local regulations is determinative. *Hunt* v. *Washington State Apple Advertising Commission*, 97 S.Ct. at 2445-46; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 375; *Dean Milk Co.* v. *Madison*, 340 U.S. at 354.

The decisions by this Court establish that a statute prejudicial to out-of-state competitors is not saved because it also may be harmful to some intrastate residents as well. Milk from most of Wisconsin, as well as Illinois, was barred by Madison's five mile limitation, but the Court in *Dean Milk* found it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." (340 U.S. at 354). *See also Brimmer* v. *Rebman*, 138 U.S. 78, 82-83 (1891); *Minnesota* v. *Barber*,

[16] The record contains testimony in support of the bill by the Executive Director of the Greater Washington/Maryland Service Station Association. (A. 755-61).

136 U.S. 313, 326 (1890). As the Court stated in *Brimmer*:

> [A] burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. (138 U.S. at 82-83).

Similarly in *Nippert* v. *Richmond*, 327 U.S. 416, 432 (1946), the Court, in holding unconstitutional Richmond's tax on solicitors, recognized that the tax "may strike as heavily upon some Virginia solicitors . . . as it does upon others who come" from other states. Although the Richmond ordinance "does not discriminate on its face between [local retail] merchants and transient solicitors" (*id.* at 433 n.24), the "fixed substantial sum" of the tax imposed during the first year (*id.* at 427), after which only a small percentage was due, made the tax "not only burdensome but prohibitive" for "the small operator particularly and more especially the casual or occasional one from out of state" (*id.* at 429). The Court found this "discrimination . . . as between out-of-state solicitors and regular retail merchants . . . only less obvious" but "not less real" than that in *Best & Co., Inc.* v. *Maxwell*, 311 U.S. 454 (1940), where the North Carolina law fixed a lower rate for the latter. (327 U.S. at 433 n.24). The Court concluded in *Nippert*:

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only

to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position. (*Id.* at 431).

These authorities establish that the mere fact that the Maryland Act would apply to Maryland producers and refiners, if there were any, does not immunize it from challenge under the Commerce Clause.

The Court's most recent decision on the subject, *Hunt* v. *Washington State Apple Advertising Commission*, —— U.S. ——, 97 S. Ct. 2434 (1977), is analogous in various respects to the case at bar, although the Maryland Act is also discriminatory on its face. The discriminatory impact of the North Carolina statute involved in *Washington Apple* appeared not on the face of the statute but from its practical operation. The prohibition against the display of all grades on closed containers of apples applied, on its face, to North Carolina apples as well as to Washington apples, but North Carolina had not prescribed any state grading system as had Washington. *Id.* at 2440. Thus, the effect of the North Carolina prohibition was only on out-of-state producers, just as the effect of the prohibition here is only on out-of-state refiners engaged in these activities outside Maryland, since there is no production or refining carried on in Maryland. Further, in *Washington Apple* there were "indications in the record" that the "discriminatory impact on interstate commerce was not an unintended by-product." (*Id.* at 2446). The indications that the purpose was to benefit the local dealers are even stronger here.

The North Carolina statute was also "somewhat suspect" because the closed containers did not reach the consumers who ostensibly were to be protected against the alleged confusion as to grading. Likewise, the Maryland Act, which is ostensibly designed to preclude refiners from discriminating against stations operated by independent dealers and to maintain competition, has its

most harmful effect on refiners which do not sell to independent dealers. Therefore, such independent refiners could not discriminate against dealers and, in fact, must and do sell at lower prices through company-operated private brand stations in order to survive. The independent dealers will be the primary beneficiaries of the elimination of this competition. It is the consumer who stands to lose. (J.A. 130a; A. 367, 429-30, 472).

The discriminatory effects of the Maryland Act are more severe than those of the North Carolina law struck down in *Washington Apple*. In contrast to *Washington Apple*, where the state statute merely increased the costs to the Washington apple growers, the uncontroverted testimony in this case established that certain refiners would be forced to withdraw from the Maryland market if the Act were upheld. (A. 357-58, 360, 457-58, 508).

Moreover, the "leveling effect" caused by the North Carolina statute's requirement that Washington apples be marketed with inferior grade symbols operates less overtly to favor local apple producers than does the Maryland Act to favor local service station dealers. The competition which service station dealers fear from stations operated by out-of-state refiners is destroyed by the Maryland law, which requires that all stations "be operated by a retail service station dealer."

After considering the type of discrimination produced by the North Carolina statute, the Court in *Washington Apple* stated that the state must "justify it in terms of local benefits . . . and the unavailability of adequate nondiscriminatory alternatives", and that "North Carolina has failed to sustain that burden on both scores." (97 S.Ct. at 2446). Maryland falls even shorter in sustaining its burden. The Maryland prohibition "does remarkably little to further [its] laudable goal" (*id.*) of promoting competition and fair allocation in time of shortage.

B. Paragraphs (B) and (C) of the Maryland Act Impose a Significant Burden on Interstate Commerce.

This Court has made it clear that regulations which increase operating costs, impair efficiency, and hamper the competitive position of interstate competitors constitute an undue burden on interstate commerce. *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 143; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 366. In *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976), this Court pointed out that the "common thread" running through the Court's decisions is that a state may not interfere "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." Paragraphs (B) and (C) impose burdens which are as severe as those considered in *Pike* and *A & P*.

The Act affects all refiners and potential refiners of petroleum products operating in interstate commerce, although the burden falls most heavily on independent refiners which traditionally rely to a much greater extent on company-operated stations to market gasoline than do the major oil companies. The Act burdens interstate commerce: (1) by eliminating existing interstate competitors from the Maryland market; (2) by imposing a formidable obstacle on out-of-state competitors desiring to enter the Maryland market; (3) by discouraging the expansion of refinery capacity by independent refiners and marketers and by interfering with interstate wholesale markets; (4) by interfering with the ability of major oil companies to respond to changing consumer needs; and (5) by obstructing the flow of petroleum products and capital into Maryland.

1. *The Act eliminates existing interstate competitors from the market for the sale of petroleum products in Maryland.*

The Act makes it economically prohibitive for integrated private brand marketers, including appellants Ashland, Kayo, and PMC, to continue marketing their products in Maryland. The testimony in this case established that marketers which sell brands of gasoline with little consumer recognition in a given market must retail their products at prices lower than those at which advertised brands are sold. (A. 356, 502-03). Such marketers have tried dealer operations and found they cannot compete effectively because legally they cannot control the price of the product sold as well as for other business reasons. (A. 450-55, 503-04, 517). For example, the President of Hudson Oil Company testified that when Hudson experimented with dealer stations, which involved about 30 of its then 120 stations, it "completely lost control of [its] stations. We had dirty stations. The dealer would not carry out the orders, and of course we did not and were not able to enforce certain regulations because they were leased out; and we cancelled our leases and took the stations back over." (A. 517-18, 521).[17]

Company-operated stations are the only viable marketing avenue for such private brand marketers, whether nonintegrated or integrated. Ashland's experience is illustrative. Near its home territory in Ashland, Kentucky, Ashland markets primarily through independent dealers because of the local public's recognition and acceptance of the Ashland brand. In markets distant from its home territory, such as Maryland, lack of such brand acceptance dictates that Ashland market exclusively

[17] At the time of the trial, Hudson was a non-integrated marketer, but was contemplating constructing a refinery. Subsequent to the trial, Hudson acquired a refinery and is therefore subject to the Act. Oil & Gas Journal, Annual Refining Issue at 117 (March 28, 1977).

through company-operated private brand outlets. (A. 501-03). This reliance upon company-operated stations is the usual practice by private brand marketers throughout the industry and independent refiners in particular. (A. 503, 517, 529).

By precluding company-operated stations, the immediate effect of the Maryland Act is to banish this type of interstate competitor from the Maryland market. If the individual states have such power and if others enact similar legislation, the effect could be either to eliminate many or all of the integrated private brand low-price competitors completely from the interstate market, or to subject them to a variety of different state laws which in itself would impair their ability to conduct an efficient and competitive interstate enterprise. As this Court noted in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 381, a state statute, the practical effect of which is to exclude from the market the products of certain interstate competitors, constitutes a "hinderance" and a "clog" upon the mobility of commerce and an undue burden on the free flow of commerce.

A no less significant effect of the Act is to bar all out-of-state producers and refiners, major brand or private brand, from operating directly any retail service stations. Producers and refiners now operating approximately 209 retail stations will be prohibited from continuing to compete in the retail market in Maryland should the Act become effective. This absolute ban from the retail market in Maryland is itself an undue burden. *Dean Milk Co.* v. *Madison*, 340 U.S. at 354. This Court's invalidation in *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 146, of an Arizona statute which imposed a "straitjacket" upon the interstate operations of only *one company* applies with greater force to the Maryland Act, which by requiring the use of dealers imposes a "straitjacket" upon a significant portion of *an entire industry*.

2. The Act imposes a barrier to entry by out-of-state competitors into the Maryland market.

One of the principal effects of the Act is to create a substantial barrier to entry into the Maryland retail petroleum product market by new out-of-state competitors. Entry into the Maryland market and other markets by such refiners is not an isolated occurrence. (A. 256, 357, 378, 506). The Act, however, as a practical matter, precludes producers and refiners not currently distributing their products in the Maryland market from entering. This is particularly true for private brand marketers which need to rely wholly or principally on company-operated stations. Major brand marketers have found it necessary to use company operations to enter new markets as exemplified by Exxon's entry into Florida. (A. 317-18). If Exxon was unable to enter a new market without initially operating its own stations, marketers with less resources would have at least the same difficulty. (A. 378).

Given Exxon's experience and the fact that companies which rely principally on company-operated stations would be kept out of the Maryland market, there is every reason to believe, as the trial court found, that the 32 of the 37 partially integrated private brand marketers presently not selling their products in Maryland would be kept out by the Maryland Act. (J.A. 130a; A. 376-77). Such exclusion from the Maryland market is inconsistent with this Court's view, as set forth in *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539 (1949), that "every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, . . . and no foreign state will by customs duties or regulations exclude them." In *Hood* the Court held unconstitutional as an undue burden on interstate commerce the denial of a license to an out-of-state milk handler to expand its milk handling facilities. This Court

noted that the state's argument in support of the prohibition on expansion, "if sustained, would be equally effective to exclude an entirely new foreign handler from coming into the state to purchase." (*Id.* at 540). This it could not do.

Such exclusion is also inconsistent with the views expressed by this Court in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973), and *FTC* v. *Procter & Gamble*, 386 U.S. 568, 581 (1967), that the elimination of potential competitors "waiting in the wings" can have an adverse effect on competition.

3. *The Act impairs the growth and competitive position of independent refiners and marketers.*

The Act impairs the growth and competitive position of independent refiners and marketers by precluding backward and forward integration, by impeding refinery operations, none of which are located in Maryland, and by interfering with interstate wholesale markets.

Since independent refiners do not have access to an assured source of crude oil for their refineries, they are especially vulnerable to supply interruptions and wide fluctuations in the cost of the crude oil. (A. 531). The capital intensive nature of the refining business means that reduced supply of crude oil impacts severely on the per unit cost of refined products. (A. 528-29).

The response of independent refiners to these problems has been to seek assured outlets for their products so as to maintain continuous refinery output. (A. 504, 531). The major oil companies achieve the same objective by establishing brand recognition and by marketing through retail dealers who purchase their products for resale at branded outlets. (A. 526). Most independent refiners simply do not have the financial resources to develop the brand recognition which the dealer form of

retail marketing requires and therefore do not market through dealers. (A. 502-03, 527-28). Consequently, independent refiners, because of their competitive position, substantially rely on company-operated stations which sell private brand gasoline at discount prices. (A. 190-91, 529). Such stations are relatively easy to establish, since customers are attracted by the lower prices. (A. 503).

The Maryland Act, by precluding assured outlets for independent refiners like Ashland and Commonwealth that market primarily or exclusively through company-operated stations, undermines the competitive position of such refiners operating in interstate commerce.[18]

The Maryland Act also bans non-integrated private brand marketers of gasoline from operating retail service stations if they integrate backwards into refining in order to improve their competitive position. Backward integration has been a traditional form of growth in the petroleum industry. (A. 379). At the trial, Mary Hudson, President of Hudson Oil Company, which sells in 36 states exclusively through company-operated outlets (over 300 stations nationwide, including 5 in Maryland), testified that Hudson was planning construction or purchase of a refinery. (A. 516, 518). While acquisition of the refinery would strengthen Hudson's competitive posture, she stated that if the Maryland Act is upheld, "[w]e would have to dispose of our stations here in Maryland and, of course, we do not want to do that." (A. 518-19).

Any inhibiting effect on backward integration caused by the Maryland or similar statutes in other states necessarily has an adverse effect upon the expansion of United States refining capacity, which the State's expert

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[18] As such it is inconsistent with the Congressional objective reflected in Sections 4(b)(1)(D) and (F) of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. §§ 751 *et seq.* (Supp. 1975)) to preserve independent refiners as a competitive force in the market.

witness acknowledged to be an anti-competitive effect of the Maryland law. (A. 632, 639-40). The adverse impact on national refinery capacity conflicts directly with the national policy formulated by Congress and articulated by federal agencies charged with the responsibility of carrying out those federal policies of encouraging the expansion of refinery capacity in the United States. The Energy Conservation and Production Act of 1976, 90 Stat. 1125 (1976), provides that the administrator of the FEA is to insure that regulations do not impose unreasonable barriers to entry for small refiners and independent refiners.[19]

Moreover, the legislative mandate banning retail marketing operations by a number of the present competitors in the Maryland market, such as Ashland and Commonwealth, would also affect the distribution of supplies by them at the wholesale level. Companies like Ashland, in addition to being retailers, serve as a principal source of supply for independent marketers. (A. 509, 623-24). Ashland uses its retail outlets to balance wholesale sales, which fluctuate in volume as wholesale prices change. Ashland presented evidence that it would be extremely difficult to remain in Maryland as a wholesaler if it lost its retail outlets, and that the likely result would be the diversion of its activities into other states. (A. 509-10). The result would be a reduction in supplies available to independent gasoline marketers in Maryland. (A. 509).

There can be no doubt that the effects of the Maryland Act are to impair the efficiency of the independent oil companies' refining operations, increase their costs of

[19] John Sawhill, then administrator-designate of the Federal Energy Administration, testified before Congress on the need for incentives for the construction of new and independent refining capacity in the United States. Hearings on Oil Refinery Development Act before the Senate Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. 263, 274-75 (1974).

operation, eliminate their marketing operations in Maryland, and reduce the flow of petroleum products. These effects on the interstate operations of independent refiners and marketers show that the ruling below upholding the Maryland Act is not consistent with the rationale of this Court's decisions in *Pike*, *A & P* and *Alexandria Scrap*.

4. *The Act interferes with the ability of major oil companies to respond to changing consumer needs.*

Ironically, the burden of the Act, the purpose of which is supposedly to preserve competition, falls most intensively on independent refiners rather than on the larger, fully integrated oil companies, since the former rely to a much greater extent on company-operated outlets. (A. 190-91). The independent refiners furnish vigorous price competition, and their practical exclusion from the Maryland market will bear heavily on consumers. (A. 429, 532). Nevertheless, appellants which market at retail predominantly through the use of independent dealers, are also adversely affected by the elimination of their company-operated stations in Maryland, which are an important part of their marketing format. Major oil companies directly operate a number of retail stations in Maryland and elsewhere for a variety of purposes, including gaining entry into new geographic markets, familiarizing themselves first-hand with the wants and needs of the consumer, providing dealer training, testing innovations in marketing methods and equipment, engaging in competition in a more extensive range of automotive parts and repair services and obtaining a retail profit. (A. 205-09, 315-19, 381-82, 648-49, 665-70). The Maryland Act's prohibition of such operations impairs the ability of such interstate companies to compete effectively in the product and service markets involved.

Such an impediment, which strips away the competitive advantages derived from the interstate operations of

major oil companies, is of a nature which the Court found impermissible in *Washington Apple*.

5. ***The Act obstructs the flow of petroleum products and capital into Maryland.***

As noted, one effect of the Maryland Act is to preclude independent refiners from engaging in the marketing of petroleum products in Maryland. At least some of the stations now operated by independent refiners will be closed if the Act becomes effective. The necessary result will be the termination of interstate shipments of petroleum products from outside Maryland which would have gone to the stations which close. In addition, by virtue of the balance that needs to be maintained by companies like Ashland between wholesale sales to independent marketers and company operations, the prohibition on company operations will necessarily adversely affect Ashland's ability to sell on the wholesale market to independent marketers in Maryland.

An additional effect of the Maryland Act is to divert the flow of capital from Maryland to other jurisdictions. (A. 383). Two examples illustrate the point. Witnesses for Exxon pointed out the importance of company operations in the development and promotion of specialized service stations such as comprehensive "Car Care Centers" which among other things provide a nationwide guaranty. (A. 310, 319-20). Witnesses for Gulf indicated the importance of company operations in their efforts to enter the self-service field. (A. 646-47).

The Court in *Pike* noted that the practical effect of the Arizona statute was to require an out-of-state cantaloupe grower to maintain a packing plant in Arizona, and that such a requirement, which increased costs, diverted business and employment opportunities and imposed an artificial rigidity on the economic pattern of the industry, could

not be justified in light of the "tenuous" interest of the state in promoting Arizona-grown cantaloupes. Similarly in the present case the requirement that service stations be operated by dealers, which will result in increased costs and the diversion of petroleum products and capital from Maryland, cannot be justified by any of the asserted local interests involved.

6. ***The Maryland Court of Appeals' analysis is inconsistent with this Court's treatment of Commerce Clause problems.***

a. *The Maryland Act clearly does not "merely regulate a wholly intrastate activity."* The Maryland Court of Appeals found that the Act does not violate the Commerce Clause because it "merely regulates a wholly intrastate activity, the retail marketing of gasoline within the state." (J.A. 18a).

First, the assumption that petroleum retailing is a wholly intrastate activity is insupportable. Sales of motor fuel coming from outside the State to local distributors or retail service stations, even after storage for a considerable period, were held to be *in* interstate commerce in *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 236-38 (1951). Clearly the delivery to and receipt of fuel by the service stations operated by out-of-state refiners is a part of interstate commerce, and to prohibit such stations from operating in the State, is to bar them from such commerce. *See also Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Second, as this Court noted in *Nippert* v. *Richmond*,

> the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves "incidents" occurring within each state through which

> it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local" and thus achieve its desired result. (327 U.S. at 423).

See also United States v. *Women's Sportswear Manufacturers' Association*, 336 U.S. 460, 464 (1949), where this Court stated in a somewhat different context that "if it is interstate commerce that feels the pinch it does not mater how local the operation which applies the squeeze."

Here all appellants would suffer financial losses and have the efficiency of operations impaired if they were forced to dispose of their company-operated stations. Ashland, Commonwealth and Kayo would be forced out of the Maryland market completely and thus deprived of their ability to compete in interstate commerce.

Just as the Commerce Clause authorizes Congress to regulate interstate conduct where it has an effect on interstate commerce, so also it places limits upon state regulation of intrastate conduct which has an effect on such commerce. Certainly a state could not prohibit its retailers from selling goods produced in other states, on the theory that it was only regulating an intrastate or local activity. Nor could it impose a greater tax on retail sales of such goods, as *Best & Co., Inc.* v. *Maxwell* and *Nippert* v. *Richmond* demonstrate. In *Nippert*, the Court made explicit that the effect of the local tax—and the same principle would apply to a state regulation—upon commerce was the decisive question:

> [W]hether or not a "local incident" related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce. (327 U.S. at 424).

Indeed, it would seem obvious that when the question is whether a state law discriminates against or unduly burdens interstate commerce, what is relevant is the effect on commerce and not whether the incident to which the regulation attaches is said to be interstate or intrastate.

b. *The Maryland Act will cause a shift in the flow of petroleum products brought into the State.* The Maryland Court of Appeals was of the view that the Maryland Act could not be said to burden interstate commerce because it did not limit or diminish the amount of petroleum products which could be brought into the State, or limit the availability of such products to persons traveling in interstate commerce. (J.A. 23a-24a).

Decisions holding that the Commerce Clause is designed to preclude "interference with the natural functioning of the interstate market" demonstrate that the limitation upon state regulation is not that narrow. Many of the state laws held invalid would not have reduced the quantity of a commodity which entered the state. *See, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Toomer* v. *Witsell*, 334 U.S. 385 (1948). Thus even if the total flow is not diminished, this does not save the Act. Since certain interstate competitors will be forced out of the Maryland market and the interstate shipments into Maryland will be diverted to others, the Act will undoubtedly cause a shift in the flow of commerce.

This Court has made it clear that commerce may be burdened impermissibly in ways more subtle than by simple prohibitions on imports. Regulations which increase operating costs, impair efficiency, and hamper the competitive position of participants in interstate commerce by diverting the commerce to others may also offend the Commerce Clause. The North Carolina statute before the Court in *Washington Apple* did not bar anyone from bringing apples into the state. The effects which the Court found discriminatory were the raising of

the costs for the Washington apple growers and the loss of their legitimate competitive advantages to the benefit of local apple producers. Similarly, the extrastate solicitors in *Best* and *Nippert* were subjected to a handicap which made it more difficult for them to compete with local merchants. In *Pike* the producer of cantaloupes was not barred from exporting them to California, but was required to spend $200,000 to build a new packing plant in Arizona. *See also Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977).

The record in this case establishes that the Maryland law has as one of its principal purposes the protection of local dealers against competition from interstate competitors. The record also establishes that the practical effect of the Act is to exclude substantial portions of the petroleum industry from competition in the Maryland market and to create a protected enclave for local dealers. The burdens placed by this Act on the mobility of interstate commerce are thus substantial. As will be shown, these burdens cannot be justified in terms of protecting legitimate local interests.

C. The Maryland Act's Prohibition on the Operation of Retail Stations by Producers or Refiners Affects the Operations of a National Industry.

The nature of the petroleum industry reflects the close economic interrelationship of its operations. The operations of independent refiners illustrate the relationships between refining and marketing and between marketing at wholesale and at retail. The operations of the industry are national in scope, *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319 (1851), and, indeed, are a topic of heated and continuing debate on the national level.

Appellants are not contending that the states are barred from enacting any laws regulating the petroleum

industry.[20] However, Paragraphs (B) and (C), which meddle with this interstate industry, reflect local intrusion into matters which are of national concern. Because of the interstate nature of the industry, such a law inevitably interferes with the free flow of commerce among the States, as the record here amply demonstrates.

In the light of these considerations, the Maryland Act cannot properly be said to involve the mere "preservation of the state's power over its internal affairs," or interests "peculiarly local." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. at 534; *Di Santo* v. *Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting with the concurrence of Holmes, J. and Brandeis, J.).

The consequences of a decision upholding the Maryland statute would extend far beyond Maryland. Since the Act was adopted in Maryland in 1974, there has been a nationwide movement spearheaded by dealer associations to enact similar laws in other states. During the last four years, proposals to prohibit or limit company operation of service stations have been before the legislatures of 36 jurisdictions,[21] four of which have adopted them.[22]

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[20] *See, e.g.*, Motor Fuel Inspection Law, Md. Anno. Code, Art. 56, § 157A *et seq.*; Maryland Gasoline Products Marketing Act, Md. Anno. Code, Comm. L. Art. § 11-301 *et seq.* The latter is found at J.A. 155a.

[21] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Vermont, Washington, and West Virginia.

[22] In addition to Maryland, the state legislatures of Florida and Delaware and the Council of the District of Columbia have adopted laws containing restrictions on refiner operation of service stations. The Florida law (Fla. Stat. § 526.151), which limits producer or refiner company operations to 3 percent of the total number of

The prospect that various legislatures may adopt their own versions of the Maryland law has serious implications for any company's national marketing operations. A recent Report of the House Committee on Interstate and Foreign Commerce noted that numerous states have initiated disparate legislative actions to address petroleum product franchising problems and that they have resulted in "an uneven patchwork of rules governing franchise relationships which differ from State to State." H. R. Rep. No. 94-1615, 94th Cong., 2d Sess. 17 (1976). *See also Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959); *Morgan* v. *Virginia*, 328 U.S. 373, 381-82 (1946).

The record in this case demonstrates that prohibiting refiners from operating stations in Maryland will bar out-of-state competitors and eliminate independent refiners from the Maryland market. If other states adopt similar laws, the cumulative effect upon many refiners marketing in interstate commerce could be disastrous, and would at least seriously interfere with the operations of an interstate industry. (A. 504-06, 509). *See Nippert* v. *Richmond*, 327 U.S. at 430.

This case thus presents a state law which favors local merchants over interstate competitors and places economic impediments in the way of the free flow of commerce. These factors separately and in combination demonstrate that the Maryland Act should not be allowed to stand.

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stations in the state, was declared unconstitutional by a state trial court in *Exxon Corp.* v. *Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Fla. Jan. 23, 1975); no appeal was taken. The Delaware statute (Del. Code, Tit. 6, §§ 2905-2906 (1976 Cum. Supp.)), which precludes the opening of gasoline stations operated by manufacturers of petroleum products, was upheld on a motion for partial summary judgment by the trial court which relied upon the opinion of the Maryland Court of Appeals. *Atlantic Richfield Co.* v. *Tribbitt*, C. A. Nos. 4692, 4774 (Del. Ch., New Castle County, Aug. 25, 1977).

D. The Burdens Which Paragraphs (B) and (C) of the Maryland Act Impose on Interstate Commerce are Not Justified by Benefits to Legitimate Local Interests Incapable of Being Achieved by Less Drastic Means.

Where a state law discriminates against interstate commerce rather than regulating interstate and local commerce evenhandedly, the state has the burden of showing both that important local interests are being protected and that non-discriminatory alternatives are unavailable. However, regardless of whether a statute is discriminatory or merely burdensome to interstate commerce, this Court determines "the extent of the burden that will be tolerated" by balancing that burden against "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 371.

In order to justify the discriminatory and burdensome effects of the Maryland Act upon interstate commerce, there must be both (1) a legitimate local interest and (2) a local benefit which (a) is substantial enough to outweigh the detriments to commerce, and (b) is not obtainable by means having a lesser impact on interstate activity.

The rational basis test invoked in dealing with state economic legislation challenged under the Due Process and Equal Protection clauses is not controlling. "Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated. . . ." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 304 n.5 (1976); *Bibb* v. *Navajo Freight Lines*, 359 U.S. at 529. "[T]he court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated

by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945). The national interest in the free flow of commerce cannot be safeguarded if the locally motivated judgments of a state legislature or court are accorded binding weight.

1. *The need for a legitimate local interest.*

A principal objective of the Act was to protect local dealers against competition from refiners, all of which were located outside of Maryland. The trial court found that the statute was "designed to benefit one class of merchants to the detriment of another" and that it "would primarily serve to protect the independent dealers rather than the public at large." (J.A. 130a-31a). The State's answers to the complaints declared that the Act was designed to promote "the economic welfare and continuing existence of the retail service station dealers." (A. 29, 51, 77, 104, 128, 145). This Court has stated that the "protection of local economic interests" does not justify interference with interstate trade. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. at 531.

Moreover, where a state law such as the Maryland Act involves matters purely economic in nature, rather than those such as public health, safety, or consumer fraud, this Court has indicated less willingness to tolerate burdens imposed by the law on interstate commerce. *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 143; *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. at 531. The most obvious local economic interest underlying Paragraphs (B) and (C) cannot be regarded as a legitimate basis for interfering with or burdening the flow of interstate commerce.

2. *The benefit to other alleged local interests is slight and obtainable by the use of less burdensome alternatives.*

The court below relied on two other local interests to justify the Act: (a) the necessity of preventing unfair allocation of motor fuel in time of shortage; and (b) preserving competition and preventing monopolistic control of gasoline marketing by a few large oil companies. (J.A. 14a-15a, 19a). These considerations, by themselves, are, of course, legitimate legislative objectives. However, the record in this case demonstrates that there was no substantial need for the Legislature to take these measures in order to attain these objectives; and, in addition, adequate and much less burdensome non-discriminatory alternatives were available.

(a) *Fair allocation in time of shortage.*

During the gasoline shortage in 1973, there were complaints from dealers that some suppliers gave preferential treatment in allotting motor fuel to service stations they themselves operated. Even assuming there were some instances of unfair allocation during that period, this in no way justifies an absolute prohibition on all refiner-operated service stations.

First, companies such as appellants Ashland, Commonwealth and Kayo have always used only company-operated stations in Maryland. Since they do not market through independent dealers, it is apparent they could not have discriminated against them. To force such companies out of business because of some other companies' failures to allocate fairly can have no rational basis.[23]

[23] The "evidence" of discrimination is meager at best. The "surveys" conducted by the Maryland Comptroller's office were rank hearsay and admitted not for the truth of what was contained therein, but rather to show what was before the Legislature. (A. 548-50). The evidence actually established that Exxon's allocation program,

Second, the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* (Supp. 1975), and regulations promulgated thereunder (10 C.F.R. Parts 210-211 (1977)), establish a detailed system for allocating petroleum products. That Act was carefully designed by Congress to meet the problems which arose during the shortage and thereafter.[24] Also, Paragraph (F) of the Maryland Act provides for uniform and equitable allocations in "periods of shortage." The court below construed those standards as having the same meaning as the federal Act. (J.A. 29a, 32a). After the federal mandatory allocation regulations became effective in January 1974, the record disclosed no evidence of any unfair allocation by any supplier.

For a state to deal with the matter of allocation during periods of shortage by an absolute prohibition of all refiner-operated service stations is a flagrant example of unnecessary legislative overkill. Plainly the local interest sought to be protected can be "promoted as well"—and indeed much more effectively—by means having a "lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 371.

(b) *The preservation of competition.*

The Maryland Court of Appeals stated that the Maryland Legislature could have found "that the recent trend of increased direct operation of service stations by producers and refiners, if allowed to continue, could substantially decrease competition and lead to the control of [the] market by a few major oil companies." (J.A. 19a).

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as well as Getty Oil Company's, was fair and equitable. (A. 556-57, 563-64). With respect to other parties, there simply was no evidence one way or the other.

[24] The Energy Policy and Conservation Act, § 461, 89 Stat. 955 (1975), 15 U.S.C. § 760g (Supp. 1975), has extended the operation of the Act through September 30, 1981.

In considering the need for a total ban on company-operated stations these uncontroverted facts must be kept in mind: (1) in 1974 major oil companies operated 124 out of 3,800 service stations in Maryland;[25] and (2) the trial court found, the State conceded and the Court of Appeals recognized that the existing market was "highly competitive." The trial court found that the Act, in fact, was anti-competitive and inversely related to the public welfare. (J.A. 132a).

Although the expert witnesses differed as to the long run benefit to competition (J.A. 6a-7a), what cannot be disputed is that there will be a definite, direct and immediate diminution, if not elimination, of competition from low-price stations operated by out-of-state refiners. The uncontradicted evidence is that the benefit to competition, if any, will be "so slight or problematical as not to outweigh the national interest" in keeping interstate commerce free from interferences which would seriously impede it. *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 776.

Moreover, even less weight should be given to this alleged local interest, where, as here, the same public interest can be safeguarded adequately by measures much less drastic than prohibiting all refiner-operated service stations, including those operated before the law was passed. "Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of 'accommodation' of conflicting local and national interests, since any ''realistic' judgment'

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[25] Forty-two of these 124 stations operated by major oil companies were those which BP Oil Corporation ("BP") had converted to low price, limited service, company-operation after having lost $150 million in its dealer marketing program during the few years prior to 1974. BP determined that it could survive as a marketer only by adopting this marketing approach. (J.A. 131a; A. 770, 773-74); *See Call Carl, Inc.* v. *BP Oil Corp.*, 554 F.2d 623 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (U.S. Oct. 31, 1977).

whether a given state action 'unreasonably' trespasses upon national interests must, of course, consider the 'consequences to the state if its action were disallowed.'" *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 373. The Maryland Court of Appeals completely ignored the existence of less burdensome alternative means of accomplishing the State's objectives.

There are equally effective and much less drastic means of halting any perceived trend toward the conversion of dealer-operated stations to company operations. Maryland has already adopted legislation prohibiting arbitrary terminations of dealer-operations. Maryland Gasoline Products Marketing Act. Md. Anno. Code (1975), Comm. Law Art. § 11-304(g). (J.A. 158a). Insofar as anti-competitive consequences may *in the future* result from the presence of company-operated stations, Maryland law parallels the federal antitrust laws; both proscribe retail price maintenance schemes, price discrimination and predatory pricing which affect competition. *Cf.* Maryland Antitrust Act, Md. Anno. Code (1975), Comm. Law Art. § 11-201 *et seq.;* Maryland Unfair Sales Act, Md. Anno. Code (1975), Comm. Law Art. § 11-401 *et seq.* Section 7 of the Clayton Act prohibits a corporation from acquiring the stock or assets of another corporation where the effect may be to lessen competition. The federal antitrust laws were recently amended to permit the Attorney General of any state to bring a *parens patriae* suit on behalf of the residents of the state for violations of the Sherman Act. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394 (1976). *See also Burch* v. *Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977).

In addition, Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, has recently been applied to alleged unfair provisions in retail service station leasing transactions. *Standard Oil Co. (Ohio)* Dkt. No. 8910, CCH Trade Reg. Rep., ¶ 21,329 (Consent Order, July 14,

1977); *Phillips Petroleum Co.*, 84 F.T.C. 1666 (1974) (consent order for settlement purposes only with no admission or finding of violation). Congress recently granted the Commission increased enforcement power to deal with unfair and deceptive acts. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2200 (1975), 15 U.S.C. § 45(m)(1)(B) (Supp. 1975).

These statutes provide remedies for coping with any actions taken by producers or refiners which may substantially lessen competition or tend to create monopoly. A law which bars from the retail market all companies which produce or refine petroleum products, large or small, innocent or guilty of anti-competitive conduct, even though their activities intensify competition rather than the contrary, cannot be said to be necessary to preserve competition.

In sum, there are existing state and federal statutes to deal with each of the specific unfair or anti-competitive practices that the Legislature may have sought to control. The possibility that at some time in the future the consequences which Maryland fears will occur is not substantial, in view of the less drastic available alternative means of obtaining the same results, to outweigh the immediate impairment of interstate competition and the interference with the interstate market which will flow from the enforcement of the Maryland law if it is allowed to stand.

II. PARAGRAPH (D) OF THE MARYLAND ACT IS INVALID UNDER THE SUPREMACY CLAUSE.

A. Under the Supremacy Clause a State Statute Impermissibly Conflicts With a Federal Statute Where (1) Compliance With the State Statute Necessitates a Violation of the Federal Statute or (2) the State Statute Otherwise Interferes With the Purposes and Objectives of the Federal Statute.

The Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts with any federal law or treaty. *See, e.g., Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *De Canas* v. *Bica*, 424 U.S. 351, 357 n.5, 359 n.7 (1976); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). Under the "burdens or conflicts" application of the Supremacy Clause, a state statute is unconstitutional if it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting a federal statute. *De Canas* v. *Bica*, 424 U.S. at 363, *quoting Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *See also Perez* v. *Campbell*, 402 U.S. 637, 649 (1971).

A state statute is an unmistakable obstacle where compliance with its terms would necessitate a violation of a federal statute. As this Court stated in *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-43, "a holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."

Where compliance with both a federal and state statute is technically possible, the state statute is invalid where it operates to frustrate the full effectiveness of the federal statute or sets to naught a federal policy. As the Court held in *Perez* v. *Campbell*, 402 U.S. at 652, "the

controlling principle [is] that *any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.* (Emphasis supplied). This rule was stated by the Court in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229 (1964), as follows: "When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that *the federal policy 'may not be set at naught, or its benefits denied' by the state law.*" In essence, any state law "which interferes with or is contrary to federal law, must yield." *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

These basic constitutional principles have been recently applied in *Jones* v. *Rath Packing Co.*, where this Court reaffirmed that a state law is void if it would be impossible "to comply with the state law without triggering federal enforcement action." (430 U.S. at 540). The Court's opinion also shows that even in the absence of such clear conflict, a state statute is void under the Supremacy Clause if an analysis of the state statute reveals that its operation would in any way interfere with or obstruct the full and complete effectiveness of a Congressional purpose.

In this case appellants do not maintain that by enacting the Robinson-Patman Act Congress intended to "occupy the field" to the exclusion of all state regulation of price discrimination. Appellants do contend, however, that Paragraph (D) is in direct, actual, irreconcilable conflict with the Robinson-Patman Act. This conflict is twofold.

First, Paragraph (D) of the Maryland Act is inconsistent with and frustrates the full effectiveness of the Congressional purposes underlying Sections 2(a) and 2(b) of the Robinson-Patman Act. Section 2(a) of the Robinson-Patman Act proscribes only those price differentials which adversely affect competition and Section 2(b) authorizes price differentials necessary to meet the

equally low price of a competitor. In contrast, Paragraph (D) of the Maryland Act proscribes all non-uniform allowances (discounts) by producers, refiners or wholesalers of petroleum products within the State of Maryland even though they satisfy either or both of the exceptions to the federal statutory prohibition. By ignoring these two federal exceptions, Paragraph (D) frustrates the Congressional accommodation between the overall Sherman Act policy of promoting and indeed requiring competitive pricing practices and the Robinson-Patman Act policy of eliminating anti-competitive price discriminations.

Second, compliance with Paragraph (D) of the Maryland Act would expose a supplier to potential liability under the Robinson-Patman Act. Paragraph (D) requires that voluntary allowances, if granted, be made on a statewide basis, whereas Section 2(b) of the Robinson-Patman Act limits the use of the meeting competition defense to an individual competitive situation. Conformity with Paragraph (D) and the consequent spread of the geographical area covered by a voluntary allowance would thus create price differentials which could cause competitive injury that could not be justified under Section 2(b).

B. The Scope of the Robinson-Patman Act's Section 2(b) Meeting the Equally Low Price of a Competitor Defense.

Paragraph (D) imposes severe limitations upon a seller's use of the Section 2(b) defense. These limitations impose an impossible dilemma upon a supplier in Maryland and effectively frustrate the Congressional purposes and objectives underlying the meeting equally low price of a competitor defense. The conflict between Paragraph (D) and the Robinson-Patman Act thus turns, in part, on the scope and nature of Section 2(b) as developed by this Court.

1. *The Section 2(b) defense is absolute.*

The *Standard Oil* litigation between the Federal Trade Commission (hereinafter Commission or FTC) and Standard Oil Company (Indiana) is the leading authority on the rights bestowed by Section 2(b). In that case Standard proved that the lower, discriminatory prices which it granted to its customers were made in good faith to meet the equally low price of a competing supplier. Nevertheless, the Commission held that Section 2(b) was not a complete defense to such price discrimination where there was proof that the price reductions caused competitive harm. *In re Standard Oil Co.*, 41 F.T.C. 263 (1945), *modified*, 43 F.T.C. 56 (1946). This ruling was affirmed by the Court of Appeals. *Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949). This Court reversed. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

Before this Court the Commission argued that Section 2(b) did not provide a defense where the harm to competition at the customer level outweighed the benefit to competition at the seller's level that flowed from the seller's ability to meet the equally low price of its competitor. The Court rejected this balancing test and held that Section 2(b) provided a complete and absolute defense to the seller notwithstanding the incidence of injury caused to customer level competition. The Court stated that "the proviso is readily understandable as simply continuing in effect a defense which is equally absolute, but more limited in scope than that which existed under § 2 of the original Clayton Act." (*Id.* at 250-51). The Court further stressed the "effectiveness and value" (*id.* at 247) of the Section 2(b) defense, stating:

> The amended Act now safeguards the *right* of a seller to discriminate in price in good faith to meet an equally low price of a competitor, but he has the burden of proof on that question. *This right is guaranteed by statute and could not be curtailed by any mandate or order of the Commission* . . . . (*Id.* at

247 n.12, *quoting* Senate Select Temporary National Economic Committee, 76th Cong., 3d Sess., Investigation of Concentration of Economic Power, Monograph No. 42, *The Basing Point Problem* 139 (Comm. Print 1941)).

Upon remand, the FTC again denied Standard the benefits mandated by Congress in Section 2(b). *In re Standard Oil Co.*, 49 F.T.C. 923 (1953). The Court of Appeals reversed the Commission's order, *Standard Oil Co.* v. *FTC*, 233 F.2d 649 (7th Cir. 1956), and this Court affirmed, *FTC* v. *Standard Oil Co.*, 355 U.S. 396 (1958).

Since the *Standard Oil* litigation, this Court and the lower federal courts have adhered to the rule that a seller has an absolute right of self-defense under Section 2(b) to meet the equally low price of a competitor regardless of competitive impact.[26] As the Court stated in *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963), Section 2(b) "has been interpreted to afford an *absolute defense* to a charge of violating § 2(a), notwithstanding the existence of the statutorily prohibited anticompetitive effect." (Emphasis supplied).

2. *A price reduction must be tailored to an individual competitive situation.*

The scope of Section 2(b) was established by this Court in *FTC* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746

[26] *See, e.g., FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963); *Tri-Valley Packing Ass'n* v. *FTC*, 329 F.2d 694, 704 (9th Cir. 1964); *Jones* v. *Borden Co.*, 430 F.2d 568, 572 (5th Cir. 1970); *Hanson* v. *Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 226 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973).

The Section 2(b) defense is not only absolute where a seller reduces a price to *retain* its then-existing customers, but also where necessary to meet competition for *new* customers. *Cadigan* v. *Texaco Inc.*, 492 F.2d 383, 387 (9th Cir. 1974); *Sunshine Biscuits, Inc.* v. *FTC*, 306 F.2d 48, 52 (7th Cir. 1962).

(1945). Speaking to the use of Section 2(b) to justify a price system, the Court explained:

> But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' *The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.* (*Id.* at 753; emphasis supplied).

The legislative history of Section 2(b) is in accord. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936) ("the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further"). Since *Staley* the courts have uniformly held that the absolute protection afforded by Section 2(b) encompasses *only* those discriminatory price reductions which are tailored to meet a particular competitive situation.[27]

[27] *See FTC* v. *National Lead*, 352 U.S. 419, 431 (1957) ("[t]he section is designed to protect competitors in *individual transactions*"; emphasis supplied); *FTC* v. *Cement Institute*, 333 U.S. 683, 725 (1948) ("'[t]he Act . . . places emphasis on *individual competitive situations*, rather than upon a general, system of competition'", *quoting FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. at 753; emphasis supplied); *Surprise Brassiere Co.* v. *FTC*, 406 F.2d 711, 714-15 (5th Cir. 1969); *Continental Baking Co.* v. *Old Homestead Bread Co.*, 476 F.2d 97, 107-08 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); *Tri-Valley Packing Ass'n* v. *FTC*, 329 F.2d 694, 706 (9th Cir. 1964); *Exquisite Form Brassiere, Inc.* v. *FTC*, 360 F.2d 492, 493 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966). *See generally* Kuenzel & Schiffres, *Making Sense of Robinson-Patman; The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1244 (1976); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 249 (1962); *Report of the Attorney General's National Committee to Study the Antitrust Laws* 184 (1955).

3. *A Seller may only meet competition at the same functional level.*

A seller may only utilize the defense to meet the lower price of its *own* competitor and may not lower its price merely to aid its customer to meet a lower price of the *customer's* competitor. *See FTC* v. *Sun Oil Co.*, 371 U.S. at 514; *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 997-98 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). This was explored at length in *Sun*, the case which frames the Robinson-Patman issues presented by appellants.

Sun was an integrated refiner and marketer of gasoline that distributed gasoline through independent retail service station operators. Super Test, a retail service station chain, opened a station across the street from a Sun dealer, McLean, and undersold him. To help McLean meet that price competition, Sun lowered its gasoline price to him but refused to grant similar allowances to other Sun dealers in the area. The FTC issued a complaint against Sun, charging price discrimination in violation of Section 2(a) of the Robinson-Patman Act. In defense, Sun invoked the "meeting the equally low price of a competitor" defense of Section 2(b) of the Act. The Commission found that Sun had not attempted to meet a price cut originated by its own competition—another wholesale supplier; Sun had granted an allowance to one of its dealers to help him meet a price cut made by the dealer's competitor—a competing service station. Consequently, the Commission rejected Sun's use of Section 2(b) "because Sun was not meeting its own competition." (371 U.S. at 510).

In affirming the Commission, this Court noted that "[t]he only issue thus before the Court is whether Sun is here entitled to avail itself of the § 2(b) defense that its . . . 'lower price' to McLean was extended 'in good faith to meet an equally low price of a competitor.'" (*Id.* at 511). In resolving that issue, the Court disregarded as

not founded on evidence of record the court of appeals' assumption that Super Test was an integrated supplier-retailer of gasoline and proceeded "on the assumption that Super Test was engaged solely in retail operations . . . [and that] Super Test was not the beneficiary of any enabling price cut from its own supplier." (*Id.* at 512). The Court thus addressed a set of facts in which Sun had lowered its price to a customer *not* to meet the lower price offered by a *competitor of Sun*, but to allow Sun's customer (McLean) to compete with his competitor, *i.e.*, the Super Test station across the street. In that situation, the Court held that Sun's price reduction could not be justified under Section 2(b) because "the § 2(b) phrase 'equally low price of a competitor' would seem to refer to the price of a competitor of the seller who grants, and not of the buyer who receives, the discriminatory price cut." (*Id.* at 514).

The question unanswered directly by *Sun* is whether Section 2(b) encompasses a situation where a supplier such as Sun lowers its price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer which lower price is subsidized by a price reduction from that dealer's supplier, a competitor of Sun. Indeed, *Sun* specifically reserved this question, stating:

> Were it otherwise, *i.e.*, if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier —presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion. (*Id.* at 512 n.7).

At a later point in the opinion, the Court again stated:

> In this posture of the case, we find it unnecessary to pass upon the Commission's apparently alternative theory that a lower competitive offer to McLean him-

self was a prerequisite to Sun's invocation of the § 2(b) defense. (*Id.* at 529 n.19).

Following this Court's remand of *Sun* to the Court of Appeals for the Fifth Circuit, that court remanded the case to the Commission to determine whether Super Test's lower price was in fact subsidized by its supplier. *In re Sun Oil Co.*, 67 F.T.C. 341 (1965). While the issue was pending before the Commission, the proceeding was dismissed *sua sponte*. (*Id.* at 367). It is the precise question reserved in *Sun* which was explicitly decided by the Maryland Court of Appeals and which is squarely presented for decision.

C. Properly Construed Section 2(b) Furnishes a Defense to a Seller in Granting Voluntary Competitive Allowances.

In deciding the issue left unresolved in *Sun*, the Maryland court first construed the term "voluntary allowance" in Paragraph (D) to mean "temporary price reductions to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer." [28] (J.A. 35a). Turning to Section 2(b) of the Robinson-Patman Act, the Maryland court ruled that the Section 2(b) defense did not encompass the granting of voluntary allowances. Relying on *Enterprise Industries* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), and rejecting the Seventh Circuit's holding in *Bargain Car Wash* v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972), and other federal authority,[29] the court construed

[28] It is undisputed that sales of gasoline to dealers in Maryland are in the flow of interstate commerce, thus subjecting appellants to the requirements of the Robinson-Patman Act. *See Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974).

[29] *See* discussion at 66-70, *infra*.

Section 2(b) as available "only where the discriminatory price reduction is to meet the equally low price offered to *the same buyer* by a competing seller." [30] (J.A. 39a-40a; emphasis the court's). The court concluded that the above constructions of the voluntary allowance provision of Paragraph (D) and the scope of the "meeting competition defense" of Section 2(b) eliminated any possible conflict between the two statutes:

> [W]e have construed "voluntary allowances" in the state Act to mean only those price reductions offered to retail dealers to enable the dealer to meet the lower price of a *competing retail dealer*. Thus, there is no conflict between Paragraph D and § 2(b) of the Clayton Act as amended by the Robinson-Patman Act. Paragraph D of the state Act encompasses only the situation where temporary price reductions are given to a dealer to meet the lower price of a *competing dealer*, and, in our view, § 2(b) of the federal Act does not extend to that situation. (J.A. 40a; emphasis the court's).

Stated simply, the Maryland court's holding that Section 2(b) does not furnish a defense to a supplier that grants "voluntary allowances" to its retail service station dealers in response to price reductions granted by a competing supplier to that competing supplier's retail dealers interferes with the purposes and objectives of the Robinson-Patman Act and is contrary to all federal court authority and the stated official policy of the Federal Trade Commission, the United States Department of Justice and the Federal Energy Administration.

The legislative purposes embodied in the Robinson-Patman Act strongly mandate that Section 2(b) encom-

[30] As discussed *infra* at 70, the Maryland court's reliance on *Enterprise* is misplaced.

pass voluntary competitive allowances.[31] The most fundamental of such purposes is that Section 2(b) be interpreted in light of the realities of competition and the marketplace so as to preserve competitive equities. Encompassed within this Court's statement that "[c]onsiderations of fairness and convenience . . . must . . . have been controlling in the drafting of Section 2(b)," *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 78 (1953), is the recognition that competition on each functional level should be left unimpaired. As this Court stated in *Sun*, in enacting the Robinson-Patman Act "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." (371 U.S. at 520). *See also FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

In the petroleum industry, suppliers generally market through retail service stations displaying the supplier's brand name and operated by dealers as independent businessmen.[32] Intense *interbrand* competition exists between the brand name gasoline of suppliers. (A. 473).[33] Such interbrand competition means that if a supplier were to be precluded from granting voluntary competitive allowances in response to a competing supplier's price cut, the supplier's dealers would quickly lose sales to competing

[31] The legislative history of the Robinson-Patman Act shows that Congress understood that it is a competitive necessity for a seller to have the right to meet local competition. *See* discussion at 88-94, *infra*.

[32] While suppliers may not normally compete for sales to the same branded service station dealer, such dealers are completely free to switch suppliers and have in the past. *See, e.g., Krieger* v. *Texaco Inc.*, 373 F. Supp. 108, 112 (W.D.N.Y. 1973). In any case, suppliers are in competition, as recognized by the Federal Trade Commission in its *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373 (1967). *See* discussion at 69, *infra*.

[33] *See also* cases and authorities discussed at 65-70, *infra*.

retailers who were the beneficiaries of the price cut; as the dealers sold less gasoline, the supplier would sell less gasoline to its dealers. In due course, the supplier's dealers would go out of business, thereby eliminating the supplier from the local market. *See In re Sun Oil Co.*, 67 F.T.C. at 366 (Reilly, Commissioner, concurring). In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S. Ct. 2549, 2559 n.19 (1977), this Court recognized the importance of preserving such interbrand competition between manufacturers, stating that "[i]nterbrand competition . . . *is the primary concern of antitrust law*." (Emphasis supplied).

Additionally, it is both unrealistic and unfair to expect an unsupported dealer to meet the lower price of a competing retail dealer supported by its supplier. Such an unsupported dealer cannot be said to start out on "equal competitive footing." (*FTC* v. *Sun Oil Co.*, 371 U.S. at 520). Just as it would distort "competitive equities" (*id.* at 523), to permit a supplier to aid a dealer in meeting that dealer's competition, it would be disruptive of "competitive equities" to *preclude* a supplier from aiding its dealer when that dealer faces price competition not from another dealer but from that dealer's supplier. This would be especially true in areas such as Maryland where retail petroleum marketing is "a highly competitive industry." (J.A. 99a). As this Court stated in *Sun*:

> Restriction of the [§ 2(b)] defense to those situations in which a supplier responds to the price concessions of its own competitor—another supplier—maintains general competitive equities. *Fairness demands neither more nor less.* (371 U.S. at 522-23; emphasis supplied).

In accordance with these basic considerations of fairness and competitive equity, all federal authority has rejected the Maryland court's narrow reading of the scope

of the Section 2(b) defense and construed Section 2(b) as encompassing voluntary allowances granted by a supplier in response to competitive pressures levied by competing suppliers. Of the federal court authority, the decision of the Seventh Circuit in *Bargain Car Wash* v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972), most closely examines the issue reserved in *Sun* and decided by the Maryland court. Upon finding that discriminatory granting of competitive allowances resulted in violation of Section 2(a) of the Robinson-Patman Act (*id.* at 1175), the court of appeals turned to the trial court's holding and defendant American's contention that the price allowances were made to meet a competitor's lower price. Noting that availability of the Section 2(b) defense required an answer to the question reserved in *Sun* (*id.*), the court, in an opinion by Mr. Justice Clark, sitting by designation, and concurred in by Mr. Justice Stevens, sitting then as circuit judge, and Chief Judge Swygert, held that "the Section 2(b) defense is available to American if the lower price granted its individual dealer is made to meet an equally low price made by a competitor of American to an individual competitor of American's dealer." (*Id.*).

Similarly, in *Bunty* v. *Shell Oil Co.*, 1972 CCH Trade Cas. ¶ 74,252 (D. Nev. 1972), a Shell retail service station dealer alleged, *inter alia*, that Shell had violated Section 2(a) of the Robinson-Patman Act in granting competitive allowances to dealers located in an adjoining trade area but not extending such allowances to the trade area in which plaintiff was located. The district court found that the allowances were "granted to meet the price which suppliers were offering competitive dealers in the area." (*Id.* at 93,187). The court then held that "[a]ny price discrimination which affected plaintiff was the result of Shell's good faith meeting of the prices afforded competitive dealers by competitors of Shell." (*Id.* at 93,189).

In *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965), Continental raised the Section 2(b) meeting competition defense and caused issuance of subpoenas *duces tecum* on plaintiffs and third party gasoline marketers to obtain supporting information. The district court denied plaintiffs' motions to quash the subpoenas and the Tenth Circuit affirmed. Focusing on plaintiffs' contention that the information sought by Continental was irrelevant because the meeting competition defense was not available under this Court's decision in *Sun*, the court of appeals rejected plaintiffs' construction of Section 2(b) and distinguished *Sun* on the ground that as supplier-retailers, plaintiffs were "'substantial competitors'" (*id.* at 997) of Continental and that Continental had submitted proof that "*most independent service stations, including those supplied or operated by appellants, were being charged less for gasoline than Continental was charging its dealers.*" (*Id.*; emphasis supplied.) The court held that on these facts Section 2(b) was available to Continental:

> The showing of Continental is of competition in the area of the charges made in the complaint and of operations at the same functional level. In these circumstances the good faith meeting competition defense is available under § 2(b) of the Robinson-Patman Act. (*Id.* at 998).

The availability of the meeting competition defense in granting voluntary competitive allowances has also been implicitly recognized in *Belliston* v. *Texaco Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), and in *Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). In each case the court upheld the exchange of wholesale price information as essential to maintaining the Section 2(b) defense (as construed in *Sun*), where the companies were able to demonstrate that the exchanges were efforts to obtain verifica-

tions of competing suppliers' wholesale price reductions prior to granting voluntary competitive allowances. As stated in *Belliston*: [34]

> *When a [price] war started, it was necessary for the supplier of the retail outlets to grant allowances to their outlets so that they could lower their prices in order to remain competitive.* When Texaco heard from one of its Dealers that a competitor had lowered its prices, Texaco endeavored to verify the information. . . . *This much would be necessary before Texaco could lower its prices and still be within the "meeting competition" defense.* (455 F.2d at 182; emphasis supplied).

In addition to federal court authority, both the FTC and the Department of Justice have concluded that Section 2(b) encompasses the granting of voluntary competitive allowances. Since the Clayton Act charges both agencies with the enforcement of the Robinson-Patman Act,[35] their interpretation of Section 2(b) must weigh heavily in its construction. As this Court stated in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969), "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *See also Youakim* v. *Miller*, 425 U.S. 231, 235-36 (1976).

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[34] The Tenth Circuit's ruling in *Belliston* is a holding that Section 2(b) was available to Texaco in granting voluntary allowances since the court could not hear the issue of price exchanges without resolving the question of whether Section 2(b) furnished a justification for such exchanges. While the Ninth Circuit's opinion in *Gray* on the Section 2(b) question is less explicit, the court reasoned that it was Section 2(b) that furnished sufficient basis for the jury to conclude that Shell's verification efforts were "made in connection with a plausible belief that it was conforming to its legal obligations." (469 F.2d at 747).

[35] Section 11(a), 15 U.S.C. § 21(a) (1970) (Federal Trade Commission); Section 15, 15 U.S.C. § 25 (1970) (Department of Justice).

In 1967, after conducting extensive hearings,[36] the FTC issued a comprehensive *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373 (1967) (hereinafter "Report"). This Report represents "the Commission's guidelines and enforcement policy with respect to the gasoline marketing industry" (Report at 2) and specifically concludes that Section 2(b) furnishes a defense to sellers when granting voluntary allowances:

> The nature of the distribution system in the petroleum industry is such that suppliers of gasoline normally do not compete with one another on sales to the same dealer. That they are in competition with one another, however, is an undeniable fact. In the actualities of competition in the marketing of gasoline, it is only by reducing its wholesale price that the supplier can respond defensively to another supplier's price cut which is reflected in the retail price at which that supplier's gasoline is sold. . . . Consequently, we are of the opinion that a price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer. (Report at 61; 3 CCH Trade Reg. Rep. ¶ 10,373 at 18,245).

The Department of Justice in its recent *Report On The Robinson-Patman Act*, 93-97 (1977), and the Federal Energy Administration Pricing Regulations, 40 Fed. Reg.

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[36] The hearings consist of 1,751 pages of testimony encompassing virtually all information relevant to the question. (FTC, Public Hearings Relating to Marketing of Automotive Gasoline (May 3-6, 10-12, 20, 1965) (unpublished transcript in FTC library)). Indeed, it would appear that the Commission dismissed *sua sponte* the *Sun* case on remand and closed other pending matters for the very purpose of conducting these public hearings and, *inter alia*, reaching a resolution of the question reserved by this Court in *Sun*. *See* Report at 2; *In re Sun Oil Co.*, 67 F.T.C. at 366 (Reilly, Commissioner, concurring)

10655, 10658 (March 7, 1975), similarly concluded that the Section 2(b) defense is available to a supplier in the circumstances left unresolved by this Court in *Sun*.

In short, all federal authority to consider the question has concluded that Section 2(b) furnishes a defense to a seller in granting voluntary competitive allowances. In this respect, the Maryland court's reliance on the district court's opinion in *Enterprise Industries* v. *Texas Co.*, is misplaced. The district court in *Enterprise* held that Section 2(b) does not permit a seller to discriminate in price in order "to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitor." (136 F. Supp. at 421; emphasis in original). Although the precise factual situation involved in *Enterprise* is unclear, the district court apparently was faced with a situation where the lower price of the competing retail dealer was unsupported by a price cut by the dealers' supplier—precisely the situation assumed by the Court in *Sun*. The district court's decision was so construed in *Sun* where this Court noted that "[t]he precise question has not heretofore been resolved by this Court. The only reported judicial decision (other than that of the Court of Appeals in this case) considering the issue is a District Court opinion supporting the view of the Commission [citing *Enterprise*]." (371 U.S. at 512). It is thus clear that the district court's ruling in *Enterprise* is limited to the "precise" issue resolved in *Sun*.

As interpreted by this Court, Section 2(a) prohibits price discrimination whenever it may substantially lessen competition. *See Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969). Correlatively, Section 2(b) places the emphasis on competition. The relevant inquiry thus should not be into the identity of the purchaser; rather, it should be into whether the supplier is facing competition from its competitor, the meeting of which necessitates a price

reduction to its corresponding purchaser. This conforms with the express terms of Section 2(b) which provide that if a seller is meeting the equally low price of a competitor, it may lower its price to "*any* purchaser or purchasers." (15 U.S.C. § 13(b); emphasis supplied). *See Sunshine Biscuits, Inc.* v. *FTC*, 306 F.2d 48, 52 (7th Cir. 1962). To construe Section 2(b), as did the Maryland court, to encompass sales only to the same customers is unfair to sellers (and their purchasers) that confront the reality of marketplace competition. The lower court's construction of Section 2(b) engrafts an artificial limitation on the scope of the Section 2(b) defense that would severely restrict competition and nullify the Congressional purpose underlying the Robinson-Patman Act of ensuring that competitors start on equal competitive footing.

D. Compliance With Paragraph (D) Exposes a Seller to Potential Primary-Line and Secondary-Line Liability Under Section 2(a) of the Robinson-Patman Act.

1. *Compliance with Paragraph (D) exposes a seller to potential primary-line liability under Section 2(a) of the Robinson-Patman Act.*

Under Section 2(a) of the Robinson-Patman Act, a seller that discriminates in price is liable in treble damages for competitive injury thereby proximately caused to the seller's own competitors (primary-line injury). Compliance with Paragraph (D) exposes suppliers in Maryland to unavoidable potential primary-line liability. The elements of such primary-line liability are discussed in this Court's opinions in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967) and *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

In *Anheuser-Busch*, the Court held that "it is certain at least that § 2(a) is violated where there is a price dis-

crimination which deals the requisite injury to primary-line competition, even though secondary-line and tertiary-line competition are unaffected." (363 U.S. at 542-43). The Court explicitly rejected the argument that to find price discrimination at the primary-line, there had to be " 'proof that the lower price is below cost or unreasonably low for the purpose or design to eliminate competition and thereby obtain a monopoly.' " (*Id.* at 546). The Court stated simply that "there are no overtones of business buccaneering in the § 2(a) phrase 'discriminate in price.' *Rather, a price discrimination within the meaning of that provision is merely a price difference.*" (*Id.* at 549; emphasis supplied).

Anheuser-Busch makes clear that under Section 2(a) of the Robinson-Patman Act, a *prima facie* primary-line case is presented where the Seller charges prices in one area which are different than the prices the seller charges in another area (territorial price discrimination) and such price differences result in the requisite injury to competition. (*Id.* at 550). As stated in *Sun*, "a 'discrimination' under § 2(a) of the Act comprehends a 'difference in price' among even non-competing purchasers, the legality or illegality of which depends upon whether or not there is likely to be substantial injury to competition among sellers." (371 U.S. at 527 n.16). *See also Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. at 702.

The standard for primary-line competitive injury in territorial price discrimination cases has most recently been reviewed in *Utah Pie*, where this Court explained that a jury could find the requisite injury to competition if a seller's "continued or sporadic" territorial price discrimination "erodes competition" or results in "a drastically declining price structure." (386 U.S. at 703). As the Court explained further, "[t]he statutory test is one that necessarily looks forward on the basis of proven conduct in the past." (*Id.*). *See National Dairy Products Corp.* v. *FTC*, 412 F.2d 605, 614-17 (7th Cir. 1969).

Under *Anheuser-Busch* and *Utah Pie*, territorial price differences may give rise to a likelihood of "substantial injury to competition among sellers" (*FTC* v. *Sun Oil Co.*, 371 U.S. at 527 n.16) and consequent liability under Section 2(a).[37] In granting competitive allowances to dealers adversely affected by a competing supplier's price cut, appellants create territorial price differences between the lower prices charged to the adversely affected dealers and the higher prices charged to other dealers. While such territorial price differences are primary-line violations of Section 2(a) if they result in the requisite injury to competition, unanimous federal authority has held that Section 2(b) furnishes an absolute defense to any *prima facie* Section 2(a) violation which may result from the granting of voluntary competitive allowances. However, to be entitled to the defense, appellants are required under *Staley* to limit the amount and geographic scope of allowances to the amount and geographic scope of the competing supplier's price cut.

In stark contrast to the limited nature of the competitive allowances granted by appellants, Paragraph (D) provides that if a competitive allowance is given to a single dealer anywhere in Maryland, the supplier is required to extend "uniformly" the same competitive allowance to every dealer of the supplier in the State. Such a statewide price extension is required even though the particular competitive situation necessitating competitive al-

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[37] As some commentators have stated, "[t]he Supreme Court has adopted an expansive view of the test of competitive injury, which has substantially diminished the burden of providing a *prima facie* case." Kuenzel & Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1212 (1976). *See also* Comment, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury*, 68 Colum. L. Rev. 137, 140 (1968).

lowances is limited to a single dealer or trade area. Since any grant of competitive allowances creates territorial price differences, and since the extension of the competitive allowances statewide cannot be justified under Section 2(b), the territorial price discrimination created by compliance with Paragraph (D) is a *prima facie* primary-line violation of Section 2(a) should the extension threaten to injure competition among suppliers. Compliance with Paragraph (D) thus exposes appellants to potential primary-line liability under Section 2(a).

For example, a supplier in competition with one or more of the appellants may grant a price reduction in one or more trade areas in Baltimore. Competitive necessity may require an appellant to grant allowances to its Baltimore dealers that are in competition with the competing supplier's retail dealers whose lower retail prices reflect the supplier's price cut.[38] Paragraph (D) would then require the appellant to grant the same price reduction to all dealers statewide. Such an extension could cause injury to small local competing suppliers operating solely in localities outside Baltimore where the price war would not have extended but for Paragraph (D). An appellant's dealers in Salisbury, Maryland, for example, would receive a price cut which would enable them to lower their retail prices and undersell the Salisbury dealers supplied by a competitor of appellant. A supplier operating only in Salisbury and supplying a number of retail stations in Salisbury could be driven out of business by such lower retail prices.

Compliance with the requirements of Paragraph D could thus "erode competition" or lead to "a drastically

[38] As the FTC stated in its 1967 Report, "[t]he competitive necessity for the discrimination [under Section 2(b)] . . . can exist, regardless of any disparity in the competitive strength of the discriminator and the supplier whose price it is meeting." (Report at 63 n.15; 3 CCH Trade Reg. Rep. ¶ 10,373 at 18, 246 n.15).

declining price structure" in local markets throughout Maryland. The supplier in Salisbury would have every incentive to bring suit against appellants under Section 2(a) to recover damages suffered because of the statewide extension of the Baltimore price war. *See Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 35 (7th Cir. 1976); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950, 956-57 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *H. J. Heinz Co.* v. *Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452, 464 (S.D.N.Y. 1960). Appellants could not justify competitive injury under Section 2(b) since the extension required by Paragraph (D) was to areas in which appellants were not facing the competing supplier's price cut. Under *Staley* such an extension is not protected by the Section 2(b) defense.[39]

The situation facing appellants is analogous to that presented in *In re Forster Manufacturing Co.*, 62 F.T.C. 852 (1963), *rev'd and remanded*, 335 F.2d 47 (1st Cir. 1964), *upon remand*, 68 F.T.C. 191 (1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Respondent Forster was charged with "territorial" price discrimination, that is, selling clothespins in Pittsburgh for approximately 10 percent less than in other areas of the country. Its Pittsburgh price was in response to the lower prices offered by a new entrant into the Pittsburgh market, Penley, who had offered a small number of Forster's customers a free case of clothespins

[39] In concluding that Section 2(b) encompassed voluntary competitive allowances, the FTC carefully noted that "[n]othing in this report should be construed as a determination by the Commission that *the burden of establishing the competitive necessity* for a discriminatory price reduction which may be justified under the Section 2(b) proviso is any different in the circumstances referred to above than in a situation in which the seller claiming the defense and the competitor whose price he is meeting are selling to the same customer." (Report at 63 n. 15; 3 CCH Trade Reg. Rep. ¶ 10,373 at 18,246 n.15; emphasis supplied).

for every 10 cases bought. (62 F.T.C. at 911). Forster responded with the same offer to all of its customers in the Pittsburgh area. The Commission held that Forster's area-wide price discrimination had resulted in primary-line injury to competition in violation of Section 2(a). The Commission rejected Forster's meeting competition defense, stating that "the statute 'places emphasis on *individual competitive situations*, rather than upon a general system of competition.'" (*Id.* at 914; emphasis the Commission's). The Commission also noted that "[i]njury at the primary level can be expected to increase in direct proportion to the number of customers receiving the spurious "counteroffer." (*Id.* at 915).

While concurring with the Commission's analysis that Forster's areawide extension of the price reduction was not protected by Section 2(b), the court of appeals reversed, disagreeing with the Commission's additional ruling that Section 2(b) required a seller to have proof positive in advance of lowering its price not only of the amount of the price it is meeting, but also the identity of its competitor. (335 F.2d at 55). Upon remand, the Commission found that Forster had failed to meet properly the equally low price of a competitor, stating: "[*T*]*he Section 2(b) defense does not permit a seller to blanket an entire area with a discriminatory price when he has reason to believe the competitive offer he purports to be meeting is not 'general,' but limited.*" (68 F.T.C. at 198; emphasis supplied).

The teaching of the *Forster* decisions has an unavoidable impact upon appellants and other gasoline suppliers in Maryland. Appellants would be exposed to liability under Section 2(a) for any harm to competition generated by their being forced to grant competitive allowances to dealers that had not been adversely affected by the competing supplier's price reduction. As the Commission found in *Forster*, the extension of the competitive allowances statewide as required by Paragraph (D) would increase injury at the primary-line level "in direct proportion to the number of customers receiving the spurious counteroffer." (62 F.T.C. at 915). *See also Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534-35 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973).

2. *Compliance with Paragraph (D) exposes a seller to potential secondary-line liability under Section 2(a) of the Robinson-Patman Act.*

Compliance with Paragraph (D) also exposes a supplier to secondary-line liability for discrimination between competing dealers. This Court's holding in *Anheuser-Busch* that price discrimination under the Robinson-Patman Act means simply "price differences" applies not only to territorial discrimination affecting primary-line competition, but also to price discrimination affecting secondary-line competition between competing purchasers. Again, the legality of price differences is dependent upon whether there is a likelihood of injury to competition. However, unlike primary-line territorial price discrimination cases where the courts have required plaintiffs to prove actual likelihood of injury to primary-line competition, *see, e.g., Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967), this Court has held that the competitive injury requirement in secondary-line cases is satisfied by a simple showing that a seller has discriminated in price between competing customers in a not insignificant amount for a not insignificant time period. *See, e.g., FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948). *See also Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674, 678-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965).

Since appellants supply dealers in states adjoining Maryland, some of whom compete with appellants' dealers located within Maryland (A. 676), these principles of secondary-line liability have direct bearing on compliance

with Paragraph (D). Although Paragraph (D) requires that all dealers in Maryland receive the same competitive allowance, this uniform but arbitrary statewide extension of a price reduction creates differences between the prices charged to dealers in Maryland and dealers located near the border of neighboring jurisdictions. Since such nearby dealers are frequently in competition with Maryland dealers (*e.g.*, dealers in Washington, D.C. may compete with dealers in Silver Spring, Maryland), the lower price to Maryland dealers mandated by Paragraph (D) would injure secondary-line competition, thus subjecting appellants to secondary-line liability in a suit by a dealer or dealers located in an adjoining state. As with discrimination affecting primary-line competition, appellants could not employ the Section 2(b) defense to avoid liability since the statewide extension would not have been tailored to an individual competitive situation, as required by *Staley*.

In an attempt to avoid such secondary-line liability, appellants would be required to extend the local Maryland price war to neighboring states. Appellants would be required either to grant decreasing amounts of allowances to dealers further removed from the Maryland border ("feathering")[40] or otherwise to succumb to the ever expanding circle of price reductions ("ripple effect") necessitated by Paragraph (D).[41] The scope of such a "ripple

[40] This use of a feathered price is necessitated by Paragraph (D). Normally, an allowance is feathered from the geographic center of the competing supplier's price reduction. The concept was suggested in *FTC* v. *Sun Oil Co.*, 371 U.S. at 528 n.17, where the Court noted that a properly feathered price reduction might obviate competitive injury among retail dealers. Indeed, Shell's practice of feathering an allowance from the center of the competing supplier's price cut was endorsed before this Court by the FTC in its Reply Brief filed in *Sun*. (Reply Brief at 6).

[41] While a feathered extension of the Maryland allowance to adjoining states might lessen potential secondary-line liability by lessening the chance of secondary-line competitive injury, such an extension could not alleviate potential primary-line liability since the extension would still create territorial price discrimination which could lead to a finding of a likelihood of injury to competition among sellers. *See FTC* v. *Sun Oil Co.*, 371 U.S. at 527 n.16.

effect" was recognized by the FTC in *Forster*. Rejecting respondents' contention that an area-wide price cut in response to a narrower specific competitive situation was necessary to avoid secondary-line injury to local purchasers, the Commission stated:

> Respondents' area-wide "meeting" of competition, . . . widened the impact area *and increased the likelihood of competitive injury not only at the primary level, but at the secondary level as well.* . . . To . . . avoid [secondary-line] discrimination and competitive injury, *respondents would have to continue widening the circle of favored customers, perhaps until they encountered some natural physical barrier (such as a mountain range) to protect the nonfavored from the favored buyers.* (62 F.T.C. at 915; emphasis supplied).

See also In re American Oil Co., 60 F.T.C. 1786, 1823 (1962), (Elman, Commissioner, dissenting), *rev'd*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).

In sum, by extending competitive allowances to unaffected dealers in compliance with Paragraph (D), a supplier is exposed to potential primary-line and secondary-line liability. Accordingly, Paragraph (D) is void under the Supremacy Clause because compliance with Paragraph (D) inevitably compels a supplier to violate federal law.

E. Paragraph (D) Is Inconsistent With and Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Congress in Enacting the Robinson-Patman Act.

Paragraph (D) also must be struck down on the independent ground that it nullifies the accomplishment and execution of the full purposes and objectives of Congress

in enacting Sections 2(a) and 2(b) of the Robinson-Patman Act. In enacting Sections 2(a) and 2(b), Congress intended to reconcile the policies of the Sherman Act and the Robinson-Patman Act by permitting price differences which would promote price flexibility and competition while prohibiting price differences which were destructive of competition. By ignoring the competitive injury requirement of Section 2(a) and effectively eliminating the Section 2(b) defense in Maryland, Paragraph (D) denies a seller of the federally bestowed right of self-defense to meet local competition and severely disrupts the delicate balance struck by Congress between the purposes of the Robinson-Patman Act and the Sherman Act. Paragraph (D) thus "clashes with the objectives" of federal antitrust law, and is therefore rendered invalid by the Supremacy Clause. *See Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. at 230-33.[42]

1. ***Paragraph (D) ignores the competitive injury requirement of Section 2(a) and destroys the Section 2(b) right to meet competition, thereby undermining the balance between the Robinson-Patman and Sherman Acts.***

The most fundamental purpose underlying the antitrust laws is the preservation and encouragement of competition. As the Court emphasized in *Standard Oil*, "[t]he heart of our national economic policy long has been faith in the value of competition." (340 U.S. at 248). *See also United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *United States* v. *Socony-Vacuum Oil Co.*, 310

[42] In *Sears, Roebuck*, the Court held that the Supremacy Clause precluded the use of a state's unfair competition law to bar a competing manufacturer from copying unpatentable goods, reasoning that such an application of state law would prohibit something permitted by federal patent law thus clashing with the balance implicitly struck by Congress of promoting invention but preserving free competition. (376 U.S. at 230-33). *Cf. Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635-37 (1975).

U.S. 150, 226 n.59 (1940). By limiting Section 2(a) of the Robinson-Patman Act to acts which may substantially lessen competition and by providing in Section 2(b) that suppliers charged with a violation of Section 2(a) could defend themselves by showing that a lower price was offered in good faith to meet the equally low price of a local competitor, Congress intended to promote competition.

By its terms Paragraph (D) forces appellants to make the ruinous choice of (1) not reducing their prices to the particular local dealers adversely affected by a competing supplier's reduction of price to its local dealers and having those dealers lose sales of the supplier's gasoline and switch to other suppliers, or go out of business or (2) meeting the competing supplier's lower price but suffering costly consequences by having to extend the same lower price to all of the supplier's dealers in Maryland.[43] *See Standard Oil Co.* v. *FTC*, 340 U.S. at 250. The end result of such a Hobson's choice is price rigidity and injury to competition both among suppliers and among their dealers.[44] (A. 675-77).

[43] For example, a statewide extension of a three-cent competitive allowance to all 194 Shell dealers in Maryland would cost Shell $12,000 *per day*. (A. 664, 675). Similar losses would be experienced by the other appellants.

[44] Price rigidity would result since a large supplier would prefer to lose sales in a locality rather than suffer thousands of dollars of losses that would result from a statewide extension of a competitive allowance. Eventual injury to competition would also result since a local supplier or a supplier entering the Maryland market could drive out a competing supplier's dealers and eventually the competing supplier itself. Again, a supplier with only a few dealers in a local area may well decide to sacrifice those dealers rather than absorb the losses a statewide extension would entail.

Moreover, the "ripple effect" necessitated by Paragraph (D) means that these effects would not be limited to Maryland. In an attempt to avoid secondary-line liability for price discrimination between competing retail dealers located in neighboring states along the Maryland border, appellants would be required to extend the

The anticompetitive effects that would result from Paragraph (D) are precisely those which Congress sought to avoid by the Robinson-Patman Act. Congress recognized that while the Sherman Act "was intended to preserve the competitive system as our economic order by maintaining the natural flow of trade and freedom of competition in interstate commerce", it alone "was inadequate to accomplish its purpose and that additional legislation was required to reach and prevent unfair methods of competition." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 6 (1936). To obtain these goals, Congress enacted the Robinson-Patman Act "to amend Section 2 of the Clayton Act so as to suppress more effectively discriminations between customers of the same seller *not supported by sound economic differences in their business positions* or in the cost of serving them." (*Id.* at 7; emphasis supplied). These amendments to the Clayton Act were done "with a careful regard to the preservation of full freedom and sound and honest business methods in all its necessary and proper operations." (*Id.* at 6). As the House Judiciary Committee stated, "[i]t is the design and intent of this bill to strengthen existing antitrust laws, prevent unfair price discriminations, and to preserve competition in interstate commerce." (*Id.* at 17).

It is thus clear that a prime Congressional objective in enacting the Robinson-Patman Act was to enhance the purposes of the Sherman Act by amending the Clayton

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Maryland allowances to dealers in neighboring jurisdictions. *See* discussion at 78-79, *supra*. Depending upon the amount of the Maryland allowance, the extension could ripple far beyond the Maryland state line. While the extent of the ripple effect along such a competitive continuum would be alleviated in part by "feathering", where the amount of the uniform Maryland competitive allowance is large, a "feathered" price reduction would encompass very large portions of adjoining states. *See FTC* v. *Sun Oil Co.*, 371 U.S. at 527 n.17. Such a widespread ripple effect exacerbates the ruinous choice faced by suppliers in Maryland.

Act so as to more effectively prohibit price discriminations which could erode competition. As this Court noted in *Standard Oil*, "[i]n the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" (340 U.S. at 248-49). These Congressional objectives, which are nullified by Paragraph (D), are served by Sections 2(a) and 2(b) of the Robinson-Patman Act.

Section 2(a) expressly limits the scope of the Act's prohibition of price discrimination to cases "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition . . . ." Congress thus realized that it is only price discrimination which is harmful to competition which should be prohibited. As this Court noted in *Anheuser-Busch*, "[w]hat we have said makes it quite evident, we believe, that our decision does not raise the specter of a flat prohibition of price differentials, inasmuch as price differences constitute but one element of a § 2(a) violation." (363 U.S. at 553). Indeed, in *Fairmont Creamery Co.* v. *Minnesota*, 274 U.S. 1, 8-9 (1927), this Court struck down as unconstitutional a state statute which prohibited price discrimination without regard to the effect on competition of such discrimination. *See also New York* v. *Mobil Oil Corp.*, 38 N.Y. 2d 460, 463-64, 381 N.Y.S.2d 426, 428-29, 344 N.E. 2d 357, 359-60 (1976) ("differential prices have long been a familiar characteristic of our free enterprise system, never thought to be either immoral or unlawful").

By conditioning the legality of price discrimination upon a showing of competitive injury, Congress intended to leave untouched price discrimination which enhanced competition or left competition unimpaired. The legislative history of the Act reveals that Congress understood

that a competitive injury clause was necessary.[45] A similar conclusion was reached more recently in the Report of the House Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters (hereinafter Antitrust Subcommittee), where it is stated that the Section 2(a) requirement of competitive injury "reconciles the Act with the Congressional antitrust policy embodied in the Sherman Act and other antitrust statutes."[46] *See Automatic Canteen Co.* v. *FTC*, 346 U.S. at 74.

In addition to Section 2(a), the purposes of the Sherman Act are promoted by the meeting competition defense of Section 2(b). The legislative history of Section 2(b) establishes that Congress recognized that necessities of competition require granting to a seller the right to discriminate in price to the extent necessary to meet competition in different communities.[47] Indeed, the Report of the House Judiciary Committee expressly provides that "[t]here is nothing in [this bill] . . . to limit the freedom of price movements in response to changing market conditions." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936). In essence, "the basic function of the 'good faith' defense of Section 2(b) is to prevent the broad prohibi-

[45] *See* Hearings on H.R. 4994, H.R. 8442 & H.R. 10486, Before a Subcomm. of the House Comm. on the Judiciary, 74th Cong., 2d Sess. 502-03, 507-08 (1936). Eugene W. Burr, a member of the trial staff of the FTC, testified that "if you pass a bill which will make discrimination per se unlawful, so that a man must . . . charge the same price to every customer, wherever he may be located, irrespective of the effect upon competition, then the result would be such that there will remain no price competition, because they will all charge the same price, inevitably. In my judgment, gentlemen, that clause should go into your bill, or you practically nullify the antitrust laws". (*Id.* at 507).

[46] H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. 23 (1976). The testimony received by the Subcommittee fully supports its conclusion. *See* Hearings Before the Ad Hoc Subcomm. on Antitrust, The Robinson-Patman Act, and Related Matters of the House Comm. on Small Business, 94th Cong., 2d Sess. pt. 1 at 227 (1975).

[47] *See* discussion at 88-94, *infra*.

tions in Section 2(a) from so rigidifying the market that a seller could not effectively compete with his rivals." *In re Sunshine Biscuits*, 59 F.T.C. 674, 684 (1961) (Elman, Commissioner, dissenting), *rev'd*, 306 F.2d 48 (7th Cir. 1962).

The fundamental purpose of Section 2(b) is thus to permit the price flexibility which is essential to the maintenance of a competitive economy. *See* Adelman, *Price Discrimination As Treated In The Attorney General's Report*, 104 U. Penn. L. Rev. 222, 236 (1955). As former Federal Trade Commissioner Elman has written, "[s]ound antitrust policy would dictate that sellers be free to price their goods flexibly in response to competitive pressures." Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 Wash. L. Rev. 1, 16 (1966). An interpretation of Section 2(b) which permits price flexibility is necessary to further competition and the purposes of Congress. As one commentator has stated:

> A decisional approach which promotes rigidity necessarily discourages price competition as a device for gaining patronage and expanding one's market. Any chipping away at the availability of the "good faith meeting competition" defense simply lends the sanctions of the Patman Act to encourage resistance to price competition. On the other hand, a swing towards liberalization of the defense removes a measure of anticompetitive restraint.

Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 Nw. U. L. Rev. 173, 178-79 (1962).

This price-flexibility function of Section 2(b) has recently received explicit Congressional recognition in the Report of the Antitrust Subcommittee, where it is stated that the Section 2(b) defense "*expressly recognizes the need for a seller to adjust his pricing practices to particular competitive situations and permits him flexibility to*

compete." [48] (H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. 24 (1976); emphasis supplied). As observed by commentators:

> [T]he right to meet a lower competitive price in good faith may be the prime means of placing Robinson-Patman sensibly into the national antitrust policy of competition. To limit that right can quite directly limit price competition, *for a seller told it must cut prices to all or to none might well choose the latter course.*

Kuenzel & Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1234-35 (1976); emphasis supplied.[49] This point was also emphasized in the Attorney General's 1955 Report on the Antitrust Laws:

> For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. [Emphasis in original.] As the Federal Trade Commission recently recommended to Congress, "the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, *is the essence of competitive economy*." *Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act.* (Report of the Attorney General's National Committee to Study the Antitrust Laws 181 (1955); emphasis supplied).

[48] *See also* Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business, 94th Cong., 2d Sess. pt. 2 at 220 (1975-1976); Elman, *supra*, 42 Wash. L. Rev., at 17.

[49] *See also* Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business, 94th Cong., 2d Sess. pt. 3 at 311 (1976) (statement of Dr. Kenneth Elzinga, Professor of Economics at the University of Virginia). Dr. Elzinga states that "[a]ny law which would require management to raise or lower all of its prices to all buyers of its product simultaneously and in equal magnitudes will either be circumvented, or if followed, will cause prices to be more rigid and remain for longer periods of time at non-economic levels. There is much wisdom in the remark of the distinguished Robinson-Patman Act observer F. M. Rowe: 'If a seller by law must lower all his prices or none, he will hesitate to lower any.'" (*Id.* at 319, *quoting* Rowe, *Price Discrimination, and Confusion: Another Look at Robinson-Patman*, 60 Yale L.J. 929, 956 (1951)).

See also ABA, *Antitrust Law Developments* 143 (1975) ("Were it not for this provision, the Robinson-Patman Act would have thwarted the Sherman Act objective of fostering price competition and price flexibility.").

These competitive realities have been repeatedly recognized by this Court and the lower federal courts. As this Court stated in *Standard Oil*:

> We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. *It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor.* (340 U.S. at 249; emphasis supplied).

Indeed, in *Standard Oil*, this Court explicitly rejected any interpretation of the Section 2(b) defense which would

> *compel the seller to choose only between ruinously cutting its price to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its price to its remaining customers to cover increased unit costs.* There is, on the other hand, plain language and established practice which permits a seller, through 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its

other customers. (340 U.S. at 250; emphasis supplied).[50]

In *Sun*, this Court also stressed the essential nature of the Section 2(b) defense, stating that as properly limited to instances where the seller is meeting the competition of its own competitors, the defense "comports . . . not only with the objectives of the Robinson-Patman Act *but with the general antitrust policy of preserving the benefits of competition.*" (371 U.S. at 522; emphasis supplied). By effectively precluding a seller from meeting local competition and by prohibiting price differences without regard to competitive impact, Paragraph (D) imposes a Hobson's choice that destroys price flexibility and effectively denies the "benefits of competition." (*Id.*).

2. *In enacting Section 2(b) Congress intended to give a seller the right of self-defense to meet competition on a local basis.*

The progress of the Robinson Bill and the Patman Bill through Congress indicates that both Houses intended to ensure that an interstate seller had the right to meet local

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[50] *See United States* v. *United States Gypsum Co.*, 550 F.2d 115, 124 (3d Cir. 1977), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3182 (U.S. Oct. 3, 1977), where the court flatly rejected the government's contention that Section 2(b) did not force verification of a lower competitive price since defendants had the choice to "(1) refrain from cutting prices to the single buyer; [or] (2) cut prices to all buyers," stating:

> Even the Government concedes that this choice is "difficult." . . . [T]he Government's alternatives would eliminate the section 2(b) defense. This, it seems to us, would be more likely to put a floor under prices than to induce wholesale cutting, since a firm in a concentrated industry would be unlikely to reduce prices across the board simply to close a single sale. And it is through isolated price reductions that established price levels are eroded, precipitating widespread price cuts. The Government's position, then, could induce greater price rigidity. (Citations omitted).

See also Great Atlantic & Pacific Tea Co., Inc. v. *FTC*, 557 F.2d 971, 983 (2d Cir. 1977).

competition. As recognized in *Standard Oil*, the legislative history indicates "that it was the purpose of Congress to limit, but not to abolish, the essence of the defense recognized as absolute in Section 2 of the original Clayton Act." (340 U.S. at 248 n.14).[51] This Congressional recognition of the need to preserve a seller's right to meet local competition is one of the ways Congress reconciled the Robinson-Patman Act with the Sherman Act, thereby promoting the overall purpose of the antitrust laws of protecting and encouraging competition. Paragraph (D) destroys this federally bestowed right to meet a local competitor's lower price.

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[51] Since the *Standard Oil* decision, this Court's construction of Section 2(b) and its legislative history has received repeated Congressional scrutiny. Legislation was introduced in the Eighty-fourth, Eighty-fifth and Eighty-sixth Congresses for the purpose of overruling this Court's interpretation of Section 2(b) as an absolute defense. *See* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 256-64 (1962). In contrast, legislation was introduced in the Eighty-second Congress immediately after the *Standard Oil* decision for the purpose of explicitly affirming this Court's reading of Section 2(b) as providing an absolute defense. *See* S. 719; S. Rep. No. 293, 82d Cong., 1st Sess. (1951). Such legislation was passed in the Senate and approved by the House Judiciary Committee. *See* H.R. Rep. No. 2438, 82d Cong., 2d Sess. (1952).

More recently, the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters of the House Comm. on Small Business held extensive hearings on suggested amendments to the Robinson-Patman Act. In its Report, the Subcommittee stated that "[t]here is no need to alter the meeting competition defenses as it has emerged over the years under the Robinson-Patman Act." H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. 78 (1976). Given the repeated Congressional consideration of this Court's construction of the meeting competition proviso in *Standard Oil* principles of *stare decisis* strongly suggest that Congress has sanctioned the Court's reading of Section 2(b) as furnishing an absolute right to meet the equally low price of a competitor. As this Court very recently stated in *Illinois Brick Co.* v. *Illinois*, —— U.S. ——, 97 S.Ct. 2061, 2070 (1977), "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."

The present Section 2(b) defense was enacted in 1936 as an amendment to a comparable, but broader, provision in Section 2 of the 1914 Clayton Act. *See generally* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 208 (1962). The history of both the original and present defense indicates that Congress has always considered it a competitive necessity for a seller to have the right to meet competition on a local basis.

The omission of a meeting competition defense in an early House version of Section 2 of the original Clayton Act, *see* H.R. 15657, 63d Cong., 2d Sess. § 2 (1914), was strongly criticized by House Judiciary Committee members:

> This section would seem to expose a manufacturer or jobber whose business extended over a wide area to a new and unjust risk. If confronted with competition at one point, and he lowers his price at such point merely and does so to meet the competitor's price in an endeavor (entirely within his legal rights) to keep the customers he has won in a successful business career, it would seem to require him to lower his price all over the vaster area in which he sells his product.
>
> * * * *
>
> A competitor who attacks at a single point and is in business only at that point might sell a small quantity of goods at lower prices, and to him this would be a negligible quantity, while the man whose business is assailed must, in order to avoid the appearance of evil and avoid the risk of litigation or prosecution, reduce his prices all over the country and thereby suffer a great loss.
>
> . . . The business of such a manufacturer or jobber would be exposed to attacks savoring of blackmail; and yet, under the requirements of this section, he would have to sit supinely by and see his trade taken away; or, if he attempts to meet the attack—

> which would be his legal right—he must run the risk of appearing to wrongfully injure the business of the competitor or else, by reducing his price everywhere, meet with a great and destructive loss. (H.R. Rep. No. 627, 63d Cong., 2d Sess. pt. 2 at 2-3 (1914)).

As originally drafted, the Senate version of Section 2 of the Clayton Act also did not include a meeting competition proviso. However, a meeting competition exception to the coverage of Section 2 was added by the Senate Judiciary Committee *"upon the ground that the enlargement will tend to foster wholesome competition."* (S. Rep. No. 698, 63d Cong., 2d Sess. 44 (1914); emphasis supplied). As enacted into law in 1914, Section 2 of the Clayton Act included the Senate's meeting competition exception.[52]

In 1936 Congress amended Section 2 of the Clayton Act with the passage of the Robinson-Patman Act, 49 Stat. 1526 (1936). On the Senate side, the Act arose out of the Robinson Bill, S. 3154. While the Senate Judiciary Committee's bill eliminated the meeting competition exception of Section 2 of the Clayton Act,[53] it was subsequently amended on the floor of the Senate to include both a meeting competition *exception* to Section 2(a) and a new meeting competition *defense* in Section 2(b). As passed by the Senate on April 30, 1936, Section 2(a) of S. 3154 provided that "nothing herein contained shall prevent discrimination in price in the same or different communities made in good faith to meet competition." The meeting the equally low price of a competitor defense in Section 2(b) of S. 3154 was the same as that eventually enacted into law. *See* F. Rowe, *supra*, 569-70.

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[52] The exception proviso stated that "nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition." (38 Stat. 730 (1914)).

[53] *See* S. Rep. No. 1502, 74th Cong., 2d Sess. (1936).

The meeting competition exception in S. 3154 was first proposed by Senator McNary. *See* 80 Cong. Rec. 6426 (1936). The day before the McNary amendment was considered, the Senate adopted the amendment offered by Senators Borah and Van Nuys. That amendment outlawed price discrimination only where its purpose was to destroy competition or eliminate a competitor. *Id.* at 6431.

Viewing the McNary amendment in conjunction with the Borah-Van Nuys amendment, Senator Logan praised both as allowing "discrimination in price to meet competition in different communities. . . ." (*Id.*). Likewise, Senator Murphy, noting by example that under the Robinson Bill an interstate milk producer would not "be able to reduce its price in any city to meet local or intrastate competition" (*id.* at 6434), stated that if such producer "should sell at a lower price in one city than in another milk shipped in interstate commerce to meet the competition of interstate commerce, it would fall within its rights in so doing and would not be guilty of a violation of the provisions of this measure." (*Id.*). After Senator Robinson had remarked that he posed no objection to the McNary amendment if taken in conjunction with the Borah-Van Nuys amendment (*id.* at 6435), the McNary amendment was passed. (*Id.* at 6436).

On the same day the Senate adopted the McNary amendment, S.3154 was amended to include the meeting the equally low price of a competitor *defense* contained in Section 2(b). (*Id.* at 6435). Senator Moore explained that "[t]he amendment merely provides that if they [milk producers] charge more to one person than to another, or are accused of discrimination, they shall have the right to prove justification." (*Id.*). Senator Moore further explained that his amendment "goes just a little further than the Borah-Van Nuys amendment or the amendment of the Senator from Oregon [Mr. McNary]." (*Id.*).

On the House side the Robinson-Patman Act arose out of the Patman Bill, H.R. 8442. As introduced, H.R. 8442 did not contain a meeting competition proviso. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 18 (1936). The meeting the equally low price of a competitor defense was added by the House Judiciary Committee. *Id.* at 2. The Committee Report makes clear that the Committee intended to limit the scope of the meeting competition *exception* of Section 2 of the original Clayton Act by eliminating the exception, but granting a seller the right to rebut a violation by showing that its lower price was an individualized response to "local competition" presented by the equally low price of a "local competitor." *Id.* at 16. As passed by the House on May 28, 1936, the Committee's meeting competition proviso had been amended to become identical to the meeting competition *defense* contained in Section 2(b) of S. 3154 as passed by the Senate and which eventually became law. *See* F. Rowe, *supra*, at 573.

The House debates over the meeting an equally low price of a competitor defense show the intent to preserve the seller's right of self-defense to meet local competition. In response to Representative Celler's concern that the Committee's bill did not grant a seller that was faced with competition in a given locality "a right to go into that locality and meet that proposition—lower your price," (80 Cong. Rec. 8228 (1936)), Representative McLaughlin, a member of the House Judiciary Committee, replied: "I have the highest regard for my very good friend, the gentleman from New York . . . *but when he states this [the Committee's bill] will do away with the right to meet competition, that is not so.*" (*Id.* at 8229; emphasis supplied). The meaning of the meeting competition proviso of the Committee's bill was similarly explained by Representative Patman who stated that "[t]he phrase 'equally low price' means *the corporate chain will have*

the right to compete with the local merchants. They may meet competition, which is all right, but they cannot cut down the price below cost for the purpose of destroying the local man." (*Id.* at 8235; emphasis supplied).

The House and Senate conferees eliminated Senator McNary's meeting competition exception in Section 2(a), but retained the meeting an equally low price of a competitor defense in Section 2(b). H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6-7 (1936). Upon presenting the Conference Report to the Senate, Senator Van Nuys, one of the conferees, explained that the meeting competition proviso retained by the Committee allowed a respondent to "rebut the prima facie case by showing that his lower prices were made in good faith to meet the prices of a competitor."[54] (80 Cong. Rec. 9903 (1936)). Both chambers passed the Conference Committee's version without further significant debate.

The foregoing legislative history shows that while Congress intended to narrow the scope of the meeting competition proviso by eliminating the meeting competition *exception* of the original Clayton Act and limiting the scope of the newly added defense to situations where the seller was confronted with the lawful, equally low prices of its own competitors, Congress also recognized that it is a competitive necessity for an interstate seller to have the right to meet "local competition" presented by "local merchants." Paragraph (D) expressly nullifies this federal right thereby frustrating "the full effectiveness of federal law." *Perez* v. *Campbell*, 402 U.S. at 652.

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[54] In light of the fact that Senator Van Nuys was a co-sponsor of the Borah-Van Nuys amendment which was read as affording a seller a right to meet local competition, his concurrence in the Conference Committee's Report suggests that he construed the meeting the equally low price of a competitor defense of Section 2(b) as protecting this right.

III. PARAGRAPH (D) OF THE MARYLAND ACT IS INVALID UNDER THE COMMERCE CLAUSE.

A. Paragraph (D) Burdens Interstate Commerce.

A state has no power to regulate either directly or indirectly commerce beyond its borders. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. at 521. As this Court recognized in *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 775, it is the "practical effect" of the regulation that is controlling. In this case, the practical effect of Paragraph (D) is to regulate commerce beyond Maryland's borders. Paragraph (D) thereby exceeds the limits of state authority and is invalid under the Commerce Clause.

It is appellants' policy to extend a voluntary allowance to all dealers in the same trade area, since all such dealers are exposed to substantially the same competitive pressures. (A. 158-60, 209-10, 650-51). Further, since trade areas are established on the basis of competitive conditions, not political boundaries, trade areas overlap Maryland's borders. (*Id.*). If Gulf, for example, were to extend a voluntary allowance to a Gulf service station dealer located in the District of Columbia, but near a Gulf dealer located in Silver Spring, Maryland, the same allowance normally would be granted to both the Maryland and District Gulf dealers affected by the competing supplier's price cut. If the voluntary allowance were extended to even one such Maryland dealer, however, Paragraph (D) would require the allowance be extended to every Gulf dealer in the State of Maryland. Moreover, consequences in the nature of "feathering" or the "ripple effect" would exacerbate the extra-territorial effects of the Maryland statewide pricing mandate.[55]

By effectively requiring a supplier such as Gulf to extend a voluntary allowance to all its Maryland dealers

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[55] *See* discussion at note 44, *supra*.

if it should grant an allowance to even one nearby District of Columbia dealer, the likelihood of extending the allowance to the District dealer will be greatly inhibited, if not totally eliminated. Likewise, a supplier would be discouraged from granting a voluntary allowance to any service station dealer in Pennsylvania, Delaware, Virginia or West Virginia located near the Maryland border. By so restricting a supplier's ability to meet competition, the Maryland Act effectively impedes interstate commerce, thereby interfering with the natural functioning of interstate markets. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. at 806. In conflict with the Commerce Clause, the effect of Paragraph (D) is to license each state and the District of Columbia to regulate "voluntary allowances" in neighboring jurisdictions. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. at 444; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. at 529-30; *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 770-71.

B. All Proper Local Interests are Promoted Through Alternatives Other than Paragraph (D) With No Adverse Impact Upon Interstate Commerce.

Under the Commerce Clause, the extent to which a burden on interstate commerce will be tolerated "depend[s] upon the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142. The Maryland Court of Appeals stated that the local interest served by Paragraph (D) is "to prevent the practice of localized price discounts." (J.A. 35a). However, to the extent that localized price discounts are anticompetitive or otherwise improper, they are prohibited by the federal Robinson-Patman Act and Maryland's own version of that Act, Md. Anno. Code (1975), Comm. L. Art. § 11-204. To the extent that localized price discounts are pro-competitive or otherwise proper, as recognized by Congress through Sections 2(a)

and 2(b) of the Robinson-Patman Act, Paragraph (D) would undermine the purposes and objectives of Congress in passing the federal law. Since the federal Robinson-Patman Act and the State's similar Act reflect the legitimate regulation of improper price discounts, the State has failed to justify Paragraph (D) in terms of proper local benefits and unavailability of less restrictive alternatives. Therefore, Paragraph (D) should be invalidated under the Commerce Clause. *Hunt* v. *Washington State Apple Advertising Commission*, 97 S.Ct. at 2446-47; *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142.

CONCLUSION

For the foregoing reasons, Paragraphs (B), (C) and (D) of the Maryland Act should be declared invalid.

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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 77-10, 77-11, 77-12,
77-47, and 77-64

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY and KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC. and PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLANTS ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., and PETROLEUM MARKETING CORPORATION

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-64

ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC. and PETROLEUM MARKETING CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLANTS ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC. AND PETROLEUM MARKETING CORPORATION

This brief is submitted by Ashland Oil, Inc. ("Ashland") and by Commonwealth Oil Refining Company, Inc. ("Commonwealth") and its subsidiary Petroleum Marketing Corporation ("PMC") in support of their appeals from that portion of the judgment of the Court of Appeals of Maryland, entered on February 18, 1977, which denied their claim that Paragraphs B and C of the Maryland Fuel Inspection Law, as amended (the "Maryland Act"), are invalid under Article I, Section 8, of the United States Constitution (the "Commerce Clause").

Other appellants in this consolidated appeal have also challenged Paragraph D of the Maryland Act.[1] Ashland and Commonwealth-PMC have not appealed the decision below as it relates to Paragraph D because their operations in Maryland would not be affected if this section of the Maryland Act were upheld. However, Ashland and Commonwealth-PMC support all arguments advanced by all the appellants. This separate brief has been filed solely because Ashland and Commonwealth-PMC believe their status as independent refiner-marketers operating in Maryland requires a separate statement of position.

OPINIONS BELOW

The main opinion of the Court of Appeals of Maryland is reported at 279 Md. 410, 370 A.2d 1102. A supplemental opinion, denying motions for reconsideration and for a stay of judgment, is reported at 279 Md. 456, 372 A.2d 237. The trial court rendered two opinions, neither of which is officially reported. The four opinions are reproduced in the Joint Appendix to Jurisdicitonal Statements.

JURISDICTION

The federal question presented here was raised in appellants' bills of complaint, filed in the Circuit Court for Anne Arundel County. (A. 136).[2] That court held the Maryland Act unconstitutional on a number of grounds, but ruled that it did not violate the Commerce Clause. (J.A. 123a).[3] On appeal, appellants renewed their Commerce

[1]Exxon Corporation, Phillips Petroleum Company, Shell Oil Company, and Gulf Oil Corporation have filed a brief challenging Paragraphs B, C and D of the Act. Continental Oil Company and its subsidiary Kayo Oil Company have limited their appeal to Paragraph C.

[2]"A." denotes the Appendix filed jointly by all parties to this consolidated appeal.

[3]"J.A." denotes the Joint Appendix to Jurisdictional Statements.

Clause arguments. The Court of Appeals of Maryland reversed the Circuit Court, holding that the Act was constitutional in all respects. In doing so, it specifically rejected appellants' Commerce Clause contentions. (J.A. 16a-24a).

The opinion of the Court of Appeals, which constitutes its judgment, was entered on February 18, 1977. Motions for reconsideration and for a stay of mandate were timely filed but were denied in a supplementary opinion filed on April 13, 1977. (J.A. 45a).

Notices of appeal to this Court were filed by Ashland on July 1, 1977 (J.A. 151a), and by Commonwealth and PMC on July 11, 1977.[4] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). Probable jurisdiction was noted on October 3, 1977.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Article I, Section 8, Clause 3, of the United States Constitution provides that

> The Congress shall have Power . . . To regulate Commerce with Foreign Nations and among the several States, and with the Indian Tribes.

Statutes

Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, added the following provisions to the Motor Fuel Inspection Law:

[4]The Commonwealth and PMC notices of appeal are reproduced as an appendix to the Jurisdictional Statement filed in No. 77-64.

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an

equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

The italicized portions were added by Chapter 608, Laws of Maryland 1975. The quoted provisions now appear as Article 56, Section 157E(b)-(h), Annotated Code of Maryland (1972 Repl. Vol., 1976 Cum. Supp., pp. 42-43). They are referred to hereafter as the "Maryland Act" or the "Act."

QUESTION PRESENTED

Whether Paragraphs (B) and (C) of the Maryland Act, which would prevent independent refiner-marketers such as Ashland and Commonwealth-PMC from operating private brand, discount gasoline stations in competition with major brand dealers, constitute an undue burden on and an unlawful discrimination against interstate commerce in violation of the Commerce Clause.

STATEMENT OF THE CASE

The legislation here at issue had its inception in 1973 and 1974 during the gasoline shortage which occurred following the crude oil embargo imposed by the Organization of Petroleum Exporting Countries ("OPEC"). The initial question was whether the shortage was "real or contrived," and whether

suppliers were fairly allocating available gasoline among different classes of retailers.[5] The ultimate legislative response, however, was an ambitious plan to restructure the retail gasoline market within the State of Maryland.

Paragraphs B and C of the Maryland Act prohibit producers and refiners[6] of petroleum products from operating retail service stations with company personnel, and provide that all such stations "must be operated by a retail service station dealer." These provisions apply to all stations, whether "major brand," "secondary brand," or "unbranded," and to all refiners. However, the effects of the prohibition will not be distributed evenly among all retail stations or among all refiners. Some retail outlets are operated primarily by dealers; others are operated exclusively by salaried personnel. One type of refiner supplies the dealer-operated stations; another type supplies the company-operated stations.

Although the categories overlap, the basic division at the retail level is between "major brand" and "private brand" stations. The basic division at the refining level is between "major oil companies" and "independent refiner-marketers." A brief explanation of these differences is necessary to a full understanding of this case.[7]

[5]The legislative history is outlined in the opinion of the Maryland Court of Appeals (J.A. 7a-10a), and is more fully discussed at pp. 32-34, *infra*.

[6]All the producing companies that operate retail service stations in Maryland are also refiners. For convenience, the term "refiners" will be used to include both crude oil "producers" and petroleum product "refiners."

[7]None of the evidentiary facts is in dispute. The basic facts were stipulated prior to trial. (A. 178-302). Additional facts were supplied by company and expert witnesses who testified at the trial. The State made no effort to controvert the facts established by these witnesses. The only evidence it offered consisted of documents and testimony relating to the Act's legislative history, and the opinion of one expert respecting its economic effects.

A. The Retail Gasoline Market

In Maryland, as elsewhere, the most common form of retail gasoline establishment is the "major brand" service station. These stations sell nationally advertised brand-name products, accept credit cards issued by the major brand supplier, and usually offer a full line of ancillary services, such as minor road repairs and tire and battery sales. (A. 306, 350-51, 368, 559-60).

A less common form of retailing is the "private brand" station. These stations sell only gasoline and motor oil; they use a multitude of unadvertised trade names, offer few, if any, services and do not accept credit cards. Such stations are sometimes referred to as "gas-and-go" outlets to distinguish them from major brand "service" stations. Private brand stations attract customers by offering gasoline at prices significantly lower than those posted by the major brand stations. (A. 349, 371, 517, 527-28). In areas where both types of stations are present, the consumer has a choice; he may patronize a major brand station, to obtain greater service, or a private brand station, to obtain a lower price.

The vast majority of major brand stations are operated by independent dealers under agreements with the oil companies that supply them.[8] Private brand stations are rarely operated by dealers, but instead are operated by salaried employees of the companies that own the stations. (A. 529, 628). The private brand operators who testified at the trial stated that none of their stations in Maryland or elsewhere were operated by dealers. (A. 348, 450, 460-61, 517).

[8]For example, as of July 1, 1974, Maryland had 628 Exxon stations, 219 Gulf stations, 128 Phillips stations, and 284 Shell stations, of which only 32 Exxon, 1 Gulf, 10 Phillips, and 1 Shell station were company-operated. Other major oil companies operating in the State, such as Texaco (307 stations), Union Oil (152 stations), and Sun Oil Company (225 stations), used independent dealers exclusively. (A. 190-91).

The reason for this is found in the economics of a successful private brand operation. To sell gasoline at a lower price, private brand operators must maintain high volume and low overhead. (A. 356, 452, 457-58, 528-29). These objectives are achieved by small investment in the property, no advertising, no service facilities, no credit, long hours of operation, few employees, and skeletal administrative forces. (A. 348-56, 453-54, 506-07). The private brand operators' high-volume, low-margin strategy works only if there is strict control of pricing and hours of operation, which cannot be achieved, legally or practically, if the station is controlled by an independent dealer. (A. 357, 450, 455, 503-04, 508, 517, 628).

Private brand stations are operated by several different kinds of companies. Some are mass merchandisers, such as discount and department stores and food chains. (A. 509). Others are wholesale jobbers, which distribute to retailers and also operate retail stations of their own. (A. 569). Still others are independent marketers, which sell only at retail and have no wholesale operations. (A. 604). However, the largest number of private brand stations in Maryland are operated by refiners.[9]

[9]As of July 1, 1974, there were 233 company-operated stations in Maryland. Of these 233 stations, 36 were private brand stations operated by nine companies having no association with a refiner (Fisca Oil Co., Giant Food, Hi-Way Oil, Inc., Homes Oil Co., Hudson Oil Company, Midway Petroleum, Pantry Pride, Savon Gas Stations, and Sears, Roebuck and Co.). The remaining 197 were operated by refiners. Approximately 55 of these 197 refiner-operated stations were major brand stations; the remaining 142 were refiner-operated private brand or secondary brand stations. (A. 190-91, 370). Some of these private and secondary brand stations are associated with major oil companies — *e.g.*, Alert (Exxon), Way-Lo (Phillips), Kayo (Continental), and BP Gas & Go (British Petroleum). (A. 606-07). Most, however, are associated with independent refiner-marketers — *e.g.*, Ashland, Commonwealth-PMC, Amerada Hess/Meadville, and Crown. (A. 376, 386).

The total number of private brand stations in the State is small — there are fewer than 200 such stations.[10] However, they are nonetheless significant factors in the market because of their low prices and high volumes. The typical private brand gas-and-go outlet sells approximately 180,000 to 200,000 gallons of gasoline a month; the typical dealer-operated station has a much lower volume. (A. 464, 530). Although separate figures for the retail market are not available, companies identified as private brand operators accounted for 24.8 per cent of all taxable gasoline sales in 1975. (A. 191-92, 409, 416).

B. Suppliers to the Retail Market

Maryland has no crude oil production fields, and no refineries operate within its borders. (A. 571, J.A. 19a). All motor vehicle fuels sold in Maryland are produced and refined elsewhere and transported into the State by pipeline, ship, or truck. (A. 194, 212-13, 216-17, 224-25, 256, 257-58, 455).

The out-of-state companies that supply gasoline to the Maryland market are of two basic types. The most significant group is comprised of "major oil companies." Major oil companies are fully integrated companies engaged in the production, refining, transportation and marketing of petroleum products. These companies own or control a substantial proportion of the crude oil used in their refineries, and sell most of their refined products through independent dealers operating major brand retail service stations. (A. 498, 526). Fifteen major oil companies do business in the United States; all fifteen operate in Maryland. (A. 376).

The Maryland market is also supplied by a number of "independent refiner-marketers." These are partially integrated companies that do not control a significant por-

[10]See note 9, *supra*.

tion of their crude oil supplies and sell most of their refined products at wholesale to independent purchasers. (A. 498, 526-27).[11] These independent refiners represent the principal sources of supply for the mass merchandisers, wholesalers and independent marketers that operate private brand stations. (A. 498, 509, 623-24). Of the 37 largest companies classified nationally as "independent refiners," only five do business in Maryland. (A. 376).

Although major oil companies can and do operate some private brand stations,[12] they have traditionally chosen to market most of their products through dealer-operated major brand service stations. Independent refiners, on the other hand, have not found it possible to market through dealers but instead have relied on company-operated

[11]This generally accepted industry definition has been incorporated into the Energy Petroleum Allocation Act of 1973, 15 U.S.C. §753:

> The term "independent refiner" means a refiner who (a) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (b) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

[12]Two of the major oil companies in this case, Exxon Corporation and Phillips Petroleum Company, sell primarily through dealer-operated branded outlets, but also operate "secondary brand" stations under the "Alert" and "Way-Lo" trade names. (A. 195-96, 235). Continental Oil Company, a major oil company, does not sell any "Conoco" brand gasoline in Maryland. Its wholly-owned subsidiary, Kayo Oil Company, sells at retail in Maryland and elsewhere through company-operated private brand "Kayo" outlets. (A. 212-13). The Kayo, Alert and Way-Lo stations are operated with company personnel, and employ a "gas and go" format similar to that used by the private brand stations. (A. 232, 236-37, 311).

private brand gas-and-go outlets to sell a portion of their production. To understand why this is so, one must understand the position of independent refiners in the national petroleum industry.

Historically, independent refiners have competed successfully with the majors. To do so, however, they have been required to adapt their operations to two problems characteristic of their position in the industry.

First, refining is capital-intensive and thus is not efficient unless plant capacities are fully utilized. (A. 501, 531). Since independent refiners do not control an assured source of crude oil, they are subject to periodic supply interruptions. When this occurs, production declines and per unit costs increase. (A. 501-03).

Second, lack of a controlled crude supply makes independent refiners vulnerable to fluctuations in the costs of raw materials. The independents must buy their crude oil from uncontrolled sources at prevailing market prices and sell their refined products in the wholesale market to customers they do not control. Increases in crude prices rapidly affect the independents' market position by driving their wholesale prices above the prices posted by competitors having access to controlled sources of lower cost supply. When this happens the independents must either absorb the added crude costs, with lessened profitability, or attempt to recover the increased costs from their customers and risk the loss of wholesale business. (A. 503-05).[13]

[13]These characteristics caused extreme difficulties for independent refiners during the fuels crisis of 1973-74, when crude shortages and escalating world crude prices placed independents at a severe competitive disadvantage. The result was an inability to supply wholesale customers at competitive prices. In Ashland's case, this produced a sudden loss of wholesale customers, who defected to other suppliers. (A. 504-05, 514). If Ashland had not been able to continue marketing

(continued)

The response of independent refiners to these problems has been to seek assured outlets for their products in order to maintain continuous production volume. (A. 505, 527). The major oil companies achieve the same objective by establishing a network of retail dealers, who typically lease their stations from the major oil company and purchase its refined products for resale at branded outlets. (A. 526). A system of this sort is not feasible for independent refiners because it can work only if the dealers can offer a recognized brand of gasoline; independent refiners simply do not have the financial resources to develop the brand recognition which this form of retail marketing requires. (A. 502-03, 527-28). Consequently, the independents have come increasingly to rely on company-operated stations which sell unbranded gasoline at discount prices, because this is the only practical way for them to enter distant markets and compete in those markets with the major oil companies. (A. 528-29).

[13](continued)

gasoline through its own retail outlets, it would have been obliged to reduce refinery runs which in turn would have further impaired the profitability of its business. (A. 504-05). Commonwealth experienced similar, and indeed more severe, difficulties during the same period. (A. 445-47). The federal government responded to the fuels crisis by enacting the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§751-757, which provides for allocation of energy supplies to compensate for crude cost disadvantages suffered by independents. (A. 291-94; *see generally* A. 262-300). Sections 4(b)(2)(D) and (F) of the act reflect an express Congressional recognition that the program mandated by the Act was designed in part "to preserve the competitive viability of independent refiners, [and] small refiners" during the period of shortages and crude cost dislocations. (*See also* A. 533, 624-25).

C. Ashland, Commonwealth and PMC

Ashland and Commonwealth are independent refiners.[14] Ashland operates seven refineries located in Kentucky, Pennsylvania, New York, Ohio and Michigan. (A. 144). Commonwealth operates a single refinery in Penuelas, Puerto Rico. (A. 255, 449). PMC is Commonwealth's marketing subsidiary. (A. 256).

Ashland and PMC sell gasoline in Maryland, both at wholesale and at retail. (A. 509-10, 623-24). The gasoline that PMC sells in Maryland is refined in Commonwealth's Puerto Rico refinery, shipped by tanker to Baltimore, and then distributed to customers and retail outlets by company-leased trucks or by common carrier. (A. 455). The gasoline that Ashland sells in Maryland is not produced by its own refineries, because no waterway or pipeline connection links them with the State. Instead, Ashland exchanges products with other refiners which do have transportation access to the market. Ashland's current exchange partner is Continental Oil Company, which transports gasoline produced at Gulf Coast refineries into Maryland via the Colonial Pipe Line. (A. 509, 212).

Ashland sells at retail in Maryland through seventeen gasoline-only outlets operating under the "Red Head," "Bi-Lo," "Payless" and "Hi-Fi" trade names. (A. 258). These stations represent a total investment of about $2.4 million; in 1974, they sold almost 27 million gallons of

[14]Ashland purchases about 85% of its crude oil requirements from domestic or foreign petroleum producers over which it has no control. (A. 257, 497-98). Commonwealth purchases 100% of its crude requirements from other producers. (A. 255). Approximately 60% of Ashland's refinery production is sold at wholesale to independent accounts; approximately 8% is sold to Ashland branded dealers in a small area adjacent to its main refinery at Ashland, Kentucky; the remaining 32% is sold through company-operated outlets located in the Midwestern, Atlantic Coast and Southeastern states. (A. 502-04). Commonwealth's sales reflect a similar pattern. (A. 256, 463).

gasoline. (A. 259). PMC's retail sales are conducted under the "Scot" trade name. There are 21 Scot stations in Maryland.[15] (A. 449). PMC's total investment in these stations is about $2 million (A. 655); the average Scot station sells about 190,000 gallons of gasoline per month. (A. 464).

The Ashland and PMC stations follow the standard marketing format used by private brand marketers. They sell gasoline and motor oil only, accept only cash, and offer no services. The stations are open 18 hours a day, 365 days a year. They usually sell at one to three cents per gallon below the prices of nearby major brand stations. (A. 451-52, 492). All stations are operated by salaried company employees; none has ever been operated by a dealer. (A. 257-58, 489). Ashland and Commonwealth operate company-owned private brand stations in Maryland because it is the only feasible way for them to function in this market. (A. 502-04, 508, 626).

Both companies also sell gasoline at wholesale; Ashland is a principal source of wholesale supply for the independent marketers that operate private brand stations in the State. (A. 509, 624). As elsewhere, Ashland uses its retail outlets to balance wholesale sales, which fluctuate in volume as wholesale prices change. (A. 509-10). This balance must be maintained because Ashland can supply its Maryland customers only by means of exchange agreements with other oil companies that deliver gasiline directly into the State; such agreements cannot be maintained unless both parties can exchange products on a regular basis. *(Id.)*.

[15]Subsequent to the filing of its Jurisdictional Statement, PMC agreed to sell all of its Maryland retail stations to another company. However, PMC hopes to continue selling gasoline at wholesale in the State if conditions permit.

D. Effects of the Maryland Act

The prohibition against refiner operation of retail service stations will have little effect on the major brand stations, the vast majority of which are operated by dealers. The principal impact of the statute will fall on private brand stations, virtually all of which are operated with company personnel.

The requirement that refiners can distribute their products only at wholesale or through dealers will impose a burden on all refiners now selling in the State at retail through company-operated outlets. The burden will fall most heavily on Ashland, Commonwealth and other refiners which operate only private brand stations and have no dealers. They cannot convert their stations to dealers, because private brand gas-and-go outlets simply cannot be operated profitably by dealers. Their only practical alternative would be to sell the stations and withdraw from retail operations in the State. (A. 357-58, 457, 508, 531). Some stations might be sold to eligible non-refiner marketers for continued use as private brand outlets — if buyers could be found. However, many would undoubtedly be permanently closed. (A. 533-34).

All witnesses who testified at the trial — including the State's expert — agreed that the private brand segment of the market provides significant competition to the major brand stations offering gasoline at discount prices. (A. 356, 370-71, [illegible] 7, 452. 517, 588-89). Thus, the immediate and most direct effect of the Act would be to eliminate most of the private brand stations from the State, which would reduce competition and increase prices. (A. 501-05, 531-32).

This, however, would not be the only adverse consequence if the Act is sustained. The Act would injure the remaining private brand operators in the market by

reducing available supplies and by preventing them from expanding their operations into refining. The Act would also injure the entire market by erecting barriers which would discourage any new refiner from entering the State.

The principal sources of supply for private brand operators have traditionally been the independent refiners. (A. 509, 623-24). If these refiners lose their retail outlets in the State, they will also lose incentive to continue to supply the wholesale market. Both Ashland and Commonwealth testified they would find it extremely difficult to continue wholesale operations if they could not also operate at retail. (A. 462-64, 509). The most likely effect of loss of the retail outlets would be a decision to divert this gasoline to other states where it could be profitably sold. (A. 508). No evidence was offered to show that other wholesaler suppliers would come forward to supply the private brand market if Ashland and Commonwealth withdraw.

Successful independent marketers eventually find they can no longer depend exclusively on wholesale purchases for their needs. The historical pattern has been one of growth at the retail level followed by "backward integration" into refining. (A. 378-80, 427-29). For example, PMC was originally an independent marketer which merged into Commonwealth as it grew and its supply needs increased. (A. 462). Hudson Oil Company, which is one of the largest independent marketers operating in Maryland, has announced plans to build its own refinery in order to improve operations. (A. 518-19). If the Act is sustained, Hudson will have to abandon its expansion plans or withdraw from the State. Hudson's owner testified that, if this choice were forced upon her, she would withdraw. (*Id.*).[16]

The Act would also harm the entire market by erecting barriers which would discourage any new competitors from

[16]Subsequent to the trial, Hudson did acquire a refinery. Oil & Gas Journal, *Annual Refinery Issue* (March 28, 1977), p. 117.

entering the State. In a free market, the most likely potential entrants would be independent refiners operating retail outlets on a national or regional basis. However, these refiners do not have the economic resources to enter as branded operators using dealers, and thus would be excluded if they could not operate their own private brand outlets. (A. 377).[17] The larger independent marketers would also be discouraged from entering, both because of supply problems and because entry would deprive them of the option of further growth by means of backward integration into refining. Even major oil companies would find it difficult to enter the State as branded operators, because the usual entry method involves establishing an initial group of company-operated stations until the stations can be converted to dealer operations.[18]

The overall result of the Maryland Act will be to reduce competition and increase prices. The principal losers will be private brand operators and consumers. The only clear winners will be the major brand dealers, who will be shielded from the competition of private brand operators. Whether Maryland may legitimately restrict its market to protect this class of local merchants is a principal issue before this Court.

[17]Ashland's experience in this regard is instructive. It has in past years attempted to enter the Pennsylvania, Ohio and Michigan markets as a branded operator. These efforts failed after substantial losses forced it to withdraw from these areas. (A. 501-03). It is Ashland's judgment, supported both by experience and by expert opinion, that it could not market gasoline beyond its home territory except through company-operated outlets. (A. 503-04, 528).

[18]In 1962, Exxon Corporation entered the Florida market in this way. Despite Exxon's size and vast financial resources, more than 5 years of promotional efforts were required before its brand name was sufficiently well established to permit a shift to dealers. (A. 317-18).

SUMMARY OF ARGUMENT

Although the states retain a residuum of power to adopt laws which affect interstate commerce, this power may not be used to interfere with natural functioning of the interstate market. State laws which have the practical effect of burdening interstate commerce by increasing operating costs and reducing the competitive strength of interstate businesses transgress this principle. So, to, do state laws which discriminate against interstate commerce in favor of local interests.

There can be no doubt that the legislation here at issue affects interstate commerce. All gasoline sold in Maryland is produced and refined elsewhere and transported into the State by ship, truck or common carrier pipeline. This gasoline is sold not only to local consumers but also to interstate travellers and trucking companies engaged in interstate commerce. The Maryland Court's conclusion that the Act regulated a "wholly intrastate activity" (J.A. 18a) is patently erroneous.

Nor can there be any doubt that the Maryland Act imposes a substantial burden on interstate commerce. Paragraphs B and C of the Maryland Act prohibit refiners from operating retail service stations with company personnel. Its principal impact will fall on those refiner-marketers, such as Ashland and Commonwealth, that sell low-cost private brand gasoline at retail exclusively through company-operated outlets. Companies of this type cannot operate in Maryland through branded dealers, and thus would be obliged to withdraw from the retail market if the Act is sustained. Loss of their retail outlets would also make it extremely difficult for the independent refiner-marketers to continue wholesale operations in the State. The result will be a diversion of gasoline to other areas, which will harm the remaining private brand operators in the market who depend upon the independent refiners for supplies.

The prohibition against company operation of retail service stations would also discourage all classes of marketers from entering the State. The overall effect of the Act, therefore, will be to reduce competition and increase prices. These effects, which interfere with the free flow of interstate goods, are plainly substantial.

It is also clear that the burdens imposed by the Act have the effect of discriminating against interstate commerce. All of the refiners that sell gasoline at retail in Maryland through company-operated stations are out-of-state businesses which transport gasoline into the State for that purpose. Most of these company-operated retail outlets sell private brand gasoline at discount prices in direct competition with dealer-operated major brand service stations. The general effect of the Act will be to shield the local dealers who operate major brand service stations from competition with the out-of-state refiners that operate private brand stations.

Although the Maryland Court found the Act facially neutral (J.A. 19a-20a), the legislative history shows that it was adopted in response to pressures from local dealers and was amended so that it would apply only to out-of-state refiners. This history, considered in relation to the Act's disproportionate impact on the refiner-marketers that compete with the local dealers, conclusively demonstrates a discrimination against interstate commerce.

When a state regulation comes into conflict with the Commerce Clause, this Court weighs the competing state and federal claims in an effort to accommodate the state's interest with the overriding requirement of freedom of commerce. If discrimination against interstate commerce is involved, the state has the burden of justifying the discrimination both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.

The discriminatory burdens imposed by the Maryland Act on independent refiner-marketers cannot be justified. The Act was ostensibly designed to protect retail service station dealers from alleged discriminations in supply between company-operated and dealer-operated stations, and to prevent suppliers from converting dealer-operated stations to company operations. These purported justifications for the Act have no application to independent refiner-marketers, such as Ashland and Commonwealth, that operate at retail exclusively through company-owned outlets and have no dealers. The only consequence of the Act, as applied to companies like Ashland and Commonwealth, would be to eliminate an important source of price competition in the marketplace. This would not promote competition, as the State contended, but would rather weaken it to the consumer's detriment.

The very purpose of the Commerce Clause was to create an area of free trade among the several states. The unjustified exclusion of independent refiner-marketers such as Ashland and Commonwealth from the Maryland retail market flies in the face of that fundamental constitutional principle.

ARGUMENT

PARAGRAPHS B AND C OF THE MARYLAND ACT CONSTITUTE AN UNDUE BURDEN ON AND AN UNLAWFUL DISCRIMINATION AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

Article I, Section 8, Clause 3 of the Constitution grants Congress the power "to regulate Commerce . . . among the

several States . . . ." Although the primary authority to regulate interstate commerce rests with Congress, this Court has long

> recognized that, in the absence of conflicting legislation by Congress, there is a residuum of powers in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).

This residuum of state power, however, is subject to the requirement that the regulation not interfere with the principle, "well established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976). As this Court recently observed, "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370 (1976). That purpose cannot be frustrated by state legislation which "comes into conflict with the Commerce Clause's overriding requirement of a national 'common market'." *Hunt v. Washington State Apple Advertising Commission*, ____ U.S. ____, 97 S.Ct. 2434, 2445 (1977).

Defining the limit of the states' power to regulate companies engaged in interstate commerce "has been the continuing task of this Court." *Boston Stock Exchange v. State Tax Commission, supra*, 429 U.S. at 329. This task involves a "'delicate adjustment of the conflicting state and federal claims'" to achieve "the necessary accommodation between local needs and the overriding requirement of free-

dom for national commerce." *Great Atlantic & Pacific Tea Co. v. Cottrell, supra,* 424 U.S. at 371. The final arbiter in all such determinations, of course, is this Court, not the state legislatures. *Breard v. Alexandria,* 341 U.S. 622, 648 (1951); *Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 769.

Although resolution of particular conflicts between competing state and federal interests necessarily turns on the circumstances of individual cases, certain basic principles have guided this Court's determinations. It is thus well established that a state may not burden commerce by regulations which have the practical effect of increasing operating costs, hampering efficiency, or otherwise reducing the competitive strength of interstate businesses. *Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2445; *Great Atlantic & Pacific Tea Co. v. Cottrell, supra,* 424 U.S. at 373-75; *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 143-46 (1970); *H.P. Hood & Sons v. Du Mond,* 336 U.S. 525, 539 (1949); *Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 781-82. So, too, is it clear that a state may not discriminate against interstate commerce by regulations that favor local interests over interstate competitors. *Hunt v. Washington State Apple Advertising Commission, supra; H.P. Hood & Sons v. Du Mond, supra; Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935); *Buck v. Kuykendall,* 267 U.S. 307 (1925).

If a state regulation burdens interstate commerce, but does not discriminate against it, this Court seeks to accommodate the competing federal and state interests by balancing the relative strengths of each:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., supra, 397 U.S. at 142 (citations omitted). If the regulation also discriminates against interstate commerce, far more is required to justify it. Certain forms of discrimination are virtually illegal *per se,* no matter how legitimate the local interest served. *Id.* at 145. More subtle discriminations can sometimes be justified, but the balance favors free trade and "the burden falls on the State to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2446.

Paragraphs B and C of the Maryland Act meet none of these criteria. The prohibition against refiner-operated retail service stations burdens interstate commerce by imposing requirements which will substantially increase the costs and hamper the efficiency of all refiners that market gasoline in the State by this method. These burdens are so great in the case of Ashland, Commonwealth and other refiners selling gasoline in the private brand sector as to exclude them entirely from the market. The purpose and practical effect of the Act is to discriminate against independent refiner-marketers and other private brand operators, to the benefit of local dealers who operate major brand service stations. There is no state interest which could possibly justify this oppressive and discriminatory result.

A. The Maryland Act Imposes a Significant Burden on Interstate Commerce.

The Court of Appeals held that the Maryland Act does not violate the Commerce Clause because it "merely regulates a wholly intrastate activity, the retail marketing of gasoline." (J.A. 18a). It stated that the Act would not in any event burden interstate commerce "to a significant degree" because its implementation "would not in any way restrict the free flow of petroleum products into or out of the state." (J.A. 23a, 18a). It thus concluded that "the state's interest, as determined by the Legislature, outweighs any slight burden which the Act may impose on interstate commerce." (J.A. 24a).

The Maryland Court's first proposition reflects a serious misunderstanding of this Court's precedents. The idea that a particular activity may be exempted from the scope of the Commerce Clause simply by asserting that it is "local" in nature has long been repudiated. As Mr. Justice Rutledge stated in *Nippert v. City of Richmond, supra,* 327 U.S. at 423:

> All interstate commerce takes place within the confines of the States and necessarily involves "incidents" occurring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.

Thus, the question is not whether gasoline retailing, considered in isolation, might be characterized as a local or intrastate activity; the question is whether the Act has "substantial economic effects" on "'the transportation or intercourse which is' the commerce." *Id.*

To suggest, as did the Maryland Court, that gasoline retailing is a distinctly local activity is to ignore reality. All the motor vehicle fuels sold in Maryland are produced and refined in other parts of the country and transported into the State by ships, trucks and common carrier pipelines. These products are sold not only to local consumers, but also to interstate travellers and to trucking companies engaged in interstate commerce. (A. 196, 228-29). Retail activities having significantly fewer contacts with the flow of interstate commerce have been held within the scope of the Commerce Clause. *Daniel v. Paul,* 395 U.S. 298 (1969); *Katzenbach v. McClung,* 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964). In particular, this Court has held that companies which regularly distribute out-of-state gasoline to local retailers and wholesalers are engaged in interstate commerce within the meaning of the antitrust laws. *Standard Oil Company v. F.T.C.,* 340 U.S. 231, 236-38 (1951). It is thus too late to suggest that the direct sale of gasoline to interstate travellers and others by refiners operating across state lines does not implicate interstate commerce.

Equally erroneous is the Maryland Court's assumption that the Act would not burden commerce unless it hindered "either the import or export of goods." (J.A. 18a). This Court has not hesitated to strike down state regulations which in effect prohibited imports or embargoed exports, *see, e.g., Baldwin v. G.A.F. Seelig, Inc., supra; H.P. Hood & Sons v. Du Mond, supra,* but it has also made clear that interstate commerce may be burdened in more subtle ways. *Hunt v. Washington State Apple Advertising Commission, supra; Great Atlantic & Pacific Tea Co. v. Cottrell, supra; Pike v. Bruce Church, Inc., supra.* The "common thread" of these and many other precedents is that a state may not "interfere with the natural functioning of the

interstate market either through prohibition *or through burdensome regulation.*" *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 806 (emphasis added). In these cases, the question was not whether the total volume of goods transported into or out of the state would be reduced, but rather whether the regulation interfered with the interstate market by burdening individual participants in that market.

The Maryland Act requires all refiners which operate retail service stations to convert those stations to dealer operations or to abandon them. This requirement burdens all refiners by depriving them of the opportunity to engage in the direct retail sale of gasoline and to obtain the commercial benefits of that activity. This burden will be substantial for all, but it will be intolerable for Ashland, Commonwealth and the other refiners that operate private brand stations in the State. For them, the statutory requirement that refiner-owned retail stations "must be operated by a retail service station dealer" is not merely an "incidental" effect of an "even-handed" regulation, *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 142; it is a virtual prohibition against the conduct of business within the State.

The Ashland and Commonwealth witnesses testified they could not convert their private brand gas-and-go outlets to dealer operations, and would in all likelihood be obliged to withdraw from retail operations if the Act were sustained. (A. 457, 463, 531). The State's expert witness conceded he had no reason to dispute this testimony. (A. 625, 628). Similar testimony — also uncontroverted — was offered by Kayo Oil Company and Hudson Oil Company. (A. 357-58, 519). The Ashland and Commonwealth witnesses also testified their companies would find it extremely difficult, if not impossible, to continue wholesale operations in Maryland if their retail outlets were lost, and that the most likely result would be a decision to divert gasoline to other

areas. (A. 508). The State made no effort to contradict this testimony and, indeed, further strengthened it through cross-examination. (A. 463, 511). The State offered no evidence to show that the gaps left by withdrawal of these retailers and wholesale suppliers would be filled by others.[19]

These facts belie the Maryland Court's conclusion that "there will be no significant disruption of the flow of petroleum products into the state nor in the distribution of those products to those in interstate commerce." (J.A. 24a). The uncontradicted evidence shows that the Act would create positive disincentives for certain firms to do business in the State and positive incentives for others to withdraw, and that this would impede the flow of petroleum products into the State. (A. 383). In both cases, the entrants most likely to be excluded, and the participants most likely to be forced to withdraw, would be independent refiner-marketers such as Ashland and Commonwealth that distribute lower-priced private brand gasoline. (A. 376-77).

Any regulation which so seriously and pervasively interferes with "the natural functioning of the interstate market," *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 806, must be found to impose a substantial burden on interstate commerce.

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[19]There is no factual basis for the Maryland Court's conclusion that "it still might be possible," if the Act were sustained, for companies that market exclusively through company-operated stations "to distribute products in Maryland both through dealer operations and on the wholesale market." (J.A. 23a). Although some of the company witnesses stated that the question of withdrawal had not yet been formally considered by their boards of directors (A. 360, 463), all of them made it clear that withdrawal was the only rational economic choice. (A. 358, 457, 508).

B. The Maryland Act Discriminates Against Interstate Commerce

This Court has consistently held that a state's power to regulate commerce cannot be used to discriminate against interstate sellers of goods or services. As Mr. Justice Brandeis said in *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. at 527:

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation . . . . Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result.

The same rationale underlies more recent decisions of this Court. *See, e.g., Hunt v. Washington State Apple Advertising Commission, supra; Boston Stock Exchange v. State Tax Commission, supra; Dean Milk Co. v. City of Madison, supra; H.P. Hood & Sons, v. Du Mond, supra; Nippert v. City of Richmond, supra.*

Based on the evidence presented at the trial, the trial court specifically found that

> among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be

> eliminated, the effect of which would be anti-consumer . . . . (J.A. 130a).

The trial court also found that the divestiture provisions of Paragraphs B and C of the Act "would be harmful to competition in the industry, and would primarily serve to protect the independent dealers rather than the public at large." *Id.* Its conclusion was definitive: "the entire bill is designed to benefit one class of merchants to the detriment of another." (J.A. 131a).[20]

The merchants benefited are the local dealers who operate major brand service stations. The merchants harmed are the independent refiner-marketers that supply private brand gasoline at discount prices. All of these refiners are out-of-state companies that sell at retail through company-operated outlets in direct competition with the major brand dealers.

The Maryland Court of Appeals did not disturb the trial court's specific factual findings. It simply disregarded them in the apparent belief that the discrimination issue could be resolved solely on legal grounds. The Court of Appeals said that the Act did not discriminate against interstate commerce because the legislative history showed its purpose "was to preserve competition within the retail gasoline marketing industry in Maryland. . . . not to protect Maryland interests from out-of-state competition." (J.A. 19a). It also said the Act did not "in effect discriminate against out-of-state economic interests" because

> [t]he Act is equally applicable to all producers and refiners . . . . If a refiner were to build refineries in

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[20]Despite these findings, the trial court concluded the Act did not violate the Commerce Clause, apparently on the theory that the Act was a local regulation not affecting the flow of petroleum products into the State. (J.A. 123a). The error of this view has already been exposed. See pp. 24-26, *supra.*

> Maryland, and were to engage in business solely within Maryland, it would be prohibited by the Act from marketing through a company operated station. (J.A. 19a-20a).

The Maryland Court's mechanistic approach is much at variance with this Court's practice in reviewing cases of possible discrimination against interstate commerce. This Court has made clear that a state statute will not be sustained under the Commerce Clause simply because it professes to be an even-handed exercise of the police power, for this

> would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.

Dean Milk Co. v. City of Madison, supra, 340 U.S. at 354. Nor is it dispositive that some local interests might be as heavily affected as the interstate interests. *Id.*; *see also Nippert v. City of Richmond, supra,* 327 U.S. at 431. The question, rather, is whether the state law, considered in economic context, "will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell,* 311 U.S. 454, 456 (1940); *see also Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2445; *Great Atlantic & Pacific Tea Co. v. Cottrell, supra,* 424 U.S. at 375; *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 380 (1964); *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. at 527.

The Court of Appeals seemed to believe there could be no discrimination against the out-of-state refiners because a hypothetical Maryland refiner would also be subject to the Act. However, the economic conflict in this case does not arise at the manufacturing level, but at the retail level. The

burdens imposed on refiners operating at the retail level have been described above.[21] The discriminatory effects of these burdens are too obvious to require extended discussion.

The Act requires all refiners to adopt a method for distributing products at retail which only some of them can, in fact, use. The practical effect of this requirement is to exclude independent refiners, such as Ashland and Commonwealth, from selling gasoline at retail through company-operated private brand outlets, and to prevent other refiners with similar operations from entering the State. This in turn affects the entire private brand sector by curtailing supply sources for wholesalers and independent marketers also operating private brand stations. The ultimate effect, as the trial court found, will be to reduce competition between the private brand and major brand sectors of the market. (J.A. 130a-131a). The beneficiaries will not be the Maryland consumers and interstate travellers who purchase gasoline at retail, but the local dealers who sell higher-priced gasoline at major brand service stations.

As recently as last term, this Court found it "somewhat suspect" that the demands of local apple growers had been mainly responsible for labeling regulations which singled out containers used for transporting apples in interstate commerce. *Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2446. Similar suspicions are warranted here with respect to a statute which in fact applies only to out-of-state refiners, which benefits only local service station dealers, and which perhaps "artlessly discloses" its purpose, *Dean Milk Co. v. City of Madison, supra,* 340 U.S. at 354, by providing that all service stations associated with refiners "must be operated by a retail service station dealer." These suspicions are fully confirmed when the Act's history is given a more thorough

[21] See pp. 26-27, *supra.*

examination than the Maryland Court of Appeals chose to undertake.

As previously noted, the Act had its inception during the 1973-74 gasoline shortage which followed imposition of the OPEC oil embargo. Reacting to complaints received from station operators and the general public, the Governor asked the Comptroller to determine whether the gasoline shortage was "real or contrived" and whether suppliers were making fair allocations. (A. 183, 687-88). Although audit investigations conducted by the Gasoline Tax Division of the Comptroller's Office failed to reveal any instances of unfair allocation (A. 551, 556-57, 563-64), a survey addressed to retail service station operators disclosed widespread discontent not only with supply allocations but also with such collateral matters as alleged unfair terminations of dealers, conversion of dealer-operated stations to company operations, sharp increases in wholesale prices, and withdrawal of allowances and other benefits.[22]

After reporting to the Governor, the Comptroller's Office prepared draft legislation to be introduced to the Legislature. The draft contained specific provisions requiring uniform apportionment of gasoline supplies during periods of shortage (now Paragraph F of the Act) and other provisions relating to dealer-supplier relationships (now Paragraphs D and E of the Act). It also contained provisions prohibiting producers, refiners and wholesalers from operating retail service stations. (A. 721-22). The reason for these prohibitions is obscure; the draftsman testified that he did not consult any economists or industry experts when he prepared the bills, and that none of

[22]The results of this survey were summarized in a report submitted to the Governor, and made available to the Legislature along with other materials prepared by the Gasoline Tax Division. (A. 698-704). The report, which contained rank hearsay, was admitted into evidence not for the truth of its conclusions but only because it formed part of the legislative history. (A. 547-49).

the facts developed by the surveys had any relation to the divestment provisions he inserted. (A. 563-65, 582). Indeed, he stated he knew of no reason why the legislation was necessary, and that he drafted the bills simply because the Comptroller directed him to do so. (A. 575-76).

When the bills were before the Legislature, they were vigorously supported by the Greater Washington/Maryland Service Station Association, whose representative testified that the 700 local Maryland dealers who belonged to the Association were the objects of a

> sinister threat of the major oil companies to complete their takeover of the retail-marketing of gasoline, not just to be in competition with their own branded dealers, but to squeeze them out and convert their stations to company operations. . . . An example of this is the BP move to eliminate its 8,000 dealers to replace them with a limited number of company-operated "Gas & Go" outlets which sell gasoline only with no service to the motorist. (A. 755, 756, 758).

Although the bills were opposed by major oil company representatives who also testified at the legislative hearings (A. 729-54), the Act was adopted by a lopsided majority and signed by the Governor. (A. 186-87).

The only substantive change made during the Legislature's consideration of the bills was to remove the restriction on company-operated stations by wholesalers. Why this was done is unclear. The draftsman testified he had included wholesalers along with producers and refiners so as "not to discriminate against one class as to another," and that he had later heard "some of the wholesalers being local jobbers . . . wanted to plea on the mercy of the committee so to speak and amend themselves out and let the

law apply to those that were entirely the producers and refiners." (A. 568).[23]

Although the Legislature issued no findings, it is apparent that the Act was conceived as a measure to protect dealers from assorted threats and pressures, including the threat of being replaced by "a limited number of company-operated 'Gas & Go' outlets which sell gasoline only with no service to the motorist." (A. 758). Paragraphs B and C of the draft bills addressed that problem by prohibiting company operations by *all* suppliers to retail stations, including wholesalers. The wholesalers, who were "local businessmen" (A. 569), objected and were amended out. (J.A. 131a). The only companies left subject to the prohibition were the out-of-state producers and refiners — including not only the "major oil companies" that the dealer representative had denounced, but also producers and refiners which had no dealers.

This Court has noted that certain kinds of statutes "lend themselves peculiarly" to discrimination against interstate commerce, and that

> this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.

Nippert v. City of Richmond, supra, 327 U.S. at 434; *see also Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 767 n.2. Although the traditional vehicles of these "provincial

[23]No transcripts of the hearing were made. However, the record reflects that representatives of several wholesalers and of the Maryland Oil Jobbers Council testified before the Senate Committee. (A. 186).

interests" have been statutes directed against door-to-door salesmen and out-of-state milk producers, the potential range of discriminatory legislation supported by local political power is not so limited.

The legislation adopted in Maryland to prevent company operation of retail service stations is but one example of a recent nationwide movement at the state level to restructure distribution patterns in the petroleum industry.[24] In Maryland, as elsewhere, the independent dealers' lobbyist groups have supplied the primary impetus for the enactment of the divestiture statutes. Part of the reason for this is the dealers' desire to protect their profit margins in the face of competition from company-operated gas-and-go outlets. (A. 610-13). The potential disruption which this dealer-inspired movement represents was recently underscored by a representative of the Federal Trade Commission:

> One problem is that several states — Maryland is a prime example — have enacted so-called marketing divestiture laws which . . . preclude direct operation of outlets by the refiners. Pushed through the legislatures by the franchised dealers,

[24]Legislation of the type at issue here has been considered in many states, and has been adopted by Florida, Delaware and the District of Columbia as well as by Maryland. *See* FLA. STAT. ANN. §526.151 (Supp. 1974); DEL. CODE ANN. §§2905-06 (Cum. Supp. 1976); D.C. LAW 1-123 (Council of the District of Columbia, April 19, 1977). The Florida statute was declared unconstitutional by a state trial court in *Exxon Corp. v. Conner,* Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, January 25, 1975); that decision was not appealed. The Delaware statute was recently found constitutional by the Delaware Court of Chancery, largely on the authority of the decision here under review. *Atlantic Richfield Co. v. Tribbitt,* C.A. Nos. 4692, 4774 (Del. Ch., Newcastle County, August 25, 1977). *See also Opinion of the Justices,* ___ N.H. ___, 376 A.2d 118 (1977), in which the New Hampshire Supreme Court ruled that proposed divestiture legislation would be constitutional, again in reliance on the opinion of the Maryland Court of Appeals.

> such legislation has sometimes had the practical effect of eliminating from state markets the *non-branded* dealers. These price-competitive retail outlets have generally been directly operated by employees of independent refiners. By failing to exempt these smaller refiners, who believe they cannot operate efficiently through a franchise system, these laws are apparently eliminating the very price cutters who most benefit consumers.[28]

The Maryland Legislature, acting in a crisis atmosphere and hearing only the voices of local dealers and wholesalers, enacted legislation which plainly discriminates against the out-of-state refiners that provide significant price competition to these same local interests. This Court "has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those critical restraints normally exerted when interests within the state are affected." *Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 767 n. 2. Such was the case here. The discrimination created by the Maryland Act, which interferes with the federal interest in guaranteeing "free access to every market in the Nation," *H.P. Hood & Sons v. Du Mond, supra,* 336 U.S. at 539, thus represents "the very kind of barrier the commerce clause was put in the fundamental law to guard against." *Nippert v. City of Richmond, supra,* 327 U.S. at 434.

[28]Statement of Owen M. Johnson, Jr., Director, Bureau of Competition, Federal Trade Commission, commenting on H.R. 130 and related bills, before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources (May 25, 1977), at 8-9 (emphasis in the original).

C. The Discriminatory Burdens Imposed by the Maryland Act Cannot be Justified by Any Legitimate Local Interest.

Although the Maryland Court of Appeals denied that the Act burdened commerce, it also found that "the state's interest, as determined by the Legislature, outweighs any slight burden which the Act may impose on interstate commerce." (J.A. 24a). The state interest identified by the Maryland Court was the Legislature's desire to preserve competition by preventing control of the retail market "by a few major oil companies." (J.A. 19a).

When discrimination against interstate commerce has been demonstrated, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2446; *see also Great Atlantic & Pacific Tea Co. v. Cottrell, supra,* 424 U.S. at 371-73; *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 142; *Dean Milk Co. v. City of Madison, supra,* 340 U.S. at 454. This burden is especially great when the interest asserted is unrelated to the protection of health and safety, because a state's promotion of local economic interests is permissible only if there is no undue discrimination against out-of-state interests. *H.P. Hood & Sons v. Du Mond, supra,* 336 U.S. at 531-33.

The Court of Appeals made no serious effort to balance competing local and interstate interests because it erroneously concluded that the Maryland Act did not burden or discriminate against interstate commerce. Had it performed the balancing process which this Court's precedents require, the Maryland Court would have been obliged to consider whether retail stations operated by independent refiners pose a threat to competition. The trial

court found that these retail stations were "a powerful source of price competition with the branded dealers," and that their elimination from the marketplace would be "anti-consumer." (J.A.130a). The Court of Appeals itself noted the State's concession "that the Act, by excluding certain partially integrated marketers, could in some respects be anti-competitive" (J.A. 15a), but failed to give this factor any weight in its consideration of the Commerce Clause issue.

The Maryland Court's analysis of that issue reflects an assumption that the Legislature's judgment concerning the need to order divestiture of company-operated retail stations could not be questioned if the Legislature reasonably believed the measure might be necessary. (J.A. 19a, 24a). This assumption is wrong as a matter of law:

> Local regulations which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play. Like any local law that conflicts with federal regulatory measures, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1970) (citations omitted); *cf. City of New Orleans v. Dukes*, 427 U.S. 297, 304 n. 5 (1976). However, even if the Maryland Court's assumptions were correct, there is no rational connection in fact between the retail activities of companies such as Ashland and Commonwealth and the supposed "evils" the court said the Legislature wished to correct.

These putative evils, as outlined by the Court of Appeals, were alleged discriminations in supply between company-operated and dealer-operated stations during the 1973-74 fuels crisis and reported plans of some companies to increase company-operated stations at the expense of dealers.

(J.A. 19a). Whatever the merits of these charges as applied to companies which market primarily through dealers,[26] the requirement that companies such as Ashland and Commonwealth must cease to operate retail service stations clearly cannot be justified as a legitimate dealer-protection measure. Ashland and Commonwealth do not operate through dealers in Maryland and have never done so. They thus have no dealers to terminate, to discriminate against as to supplies, or otherwise to treat unfairly.

The State also sought to show at the trial that divestiture was needed to inhibit vertically-integrated companies from using "immense windfall profits from the crude price increases" of recent years to "discipline" aggressive price marketers by means of selective price reductions at the retail level. (A. 594).[27] However, the expert who offered this theory admitted that crude-deficient refiners such as

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[26]The trial court found that the State had failed to produce any evidence to show that any company had discriminated against dealers in allocating supplies during the crisis period. (J.A. 131a). This finding was fully supported by the record. (A. 563-64).

[27]The theory that some refiners may be using production profits to disrupt the retail market was recently disputed by a representative of the Federal Energy Administration:

> While there are numerous allegations concerning refiners using profits from crude oil production to subsidize retail operations, we have been unable to amass substantial evidence that this is taking place on a scale that would threaten the competitive viability of branded independent dealers or any other segment of the gasoline retailing business. As pointed out earlier, branded independent dealers still sell over 71 per cent of the gasoline sold through service stations, and their market share has been essentially stable over the past year.

Statement of Gorman C. Smith, Acting Deputy Director, Federal Energy Administration, commenting on H.R. 130 and related bills, before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources (May 25, 1977), at 9. *See also id.* at 12.

Ashland and Commonwealth do not have the capacity to engage in this practice (A. 629), and that such independent refiners were themselves victims of the crisis which produced the "immense windfall profits" to which he had referred. (A. 624-25). This same expert testified he was "troubled" by the Act's application to independent refiners (A. 590), and agreed this was a "negative" feature of the Act. (A. 630). Indeed, he admitted that if he, as a professional economist, had been called upon to draft the Act he "wouldn't have drafted the law as it is drafted now." (A. 631).

The only justification which the State could offer for forbidding companies such as Ashland and Commonwealth to operate retail stations relates not to the retail gasoline market, but to alleged long-term effects on the wholesale market if certain assumptions about the operations of independent refiners prove to be correct. The State's expert testified that, if independent refiners expanded retailing operations without at the same time expanding refining capacity, this could in time diminish the supply of gasoline available in the wholesale market for independent marketers. (A. 594, 636-39).[28] He admitted, however, that this opinion was totally dependent on the validity of his assumption that independent refiners would not expand refining capacity in proportion to the expansion of their direct retail operations. (A. 640-41). He further admitted he had no knowledge of any facts which could support his "impression" that the development he contemplated would take place (A. 641), and none appear in the record.

[28]This opinion, which represented a departure from opinions expressed in the witness' prior publications, was developed in the sixty-day interval between the date of his deposition and the date of his testimony at the trial. (A. 623, 636, 637). It was not based on any new studies, but simply represented the witness' "reflection on the scenario of consequences." (A. 623).

It is apparent that the State's effort to justify application of Paragraphs B and C to independent refiners rests on nothing more than the theoretical *post hoc* rationalization of an expert who himself was "troubled" by the result. We submit that this slender reed cannot be used to support legislation which has such drastic effects on the interstate commerce pursued in Maryland and elsewhere by independent refiners. *Cf. Bibb v. Navajo Freight Lines, Inc., supra,* 359 U.S. at 530. The only consequence of the Act, as applied to Ashland and Commonwealth, would be to eliminate an important source of price competition in the marketplace. This would not serve the ostensible state objective of promoting competition, but rather would weaken it to the consumer's detriment.

Maryland has utterly failed to meet its obligation to show that any legitimate state interest justifies the disruptive and discriminatory burdens that Paragraphs B and C of the Act impose upon independent refiner-marketers. *See Hunt v. Washington State Apple Advertising Commission, supra.* "[T]he very purpose of the Commerce Clause was to create an area of free trade among the several states." *Boston Stock Exchange v. State Tax Commission, supra,* 429 U.S. at 328. The freedom which it protects "is a freedom to trade with any State, to engage in commerce across all State boundaries." *Id.* at 335. The unjustified exclusion of independent refiners such as Ashland and Commonwealth from participating in the Maryland retail market totally subverts this fundamental constitutional principle.

CONCLUSION

The Maryland Act represents an effort by a single state legislature to deal at the local level with economic problems which are national and even international in scope, and which have their origins outside the boundaries of the state. Maryland has attacked the problem at the retail level

because this is the only aspect of the petroleum industry over which it has any control. Although Maryland has the power to legislate to protect the economic welfare of its citizens, this power cannot be used — either legally or practically — to affect the economic organization of an entire industry. Only Congress could enact uniform rules to govern marketing patterns in an industry as complex and as vital to the nation's welfare as this one is, if any such rules are needed.

Since the inception of severe energy shortages and escalating petroleum prices in 1973, the Congress has been actively considering the complex structure of the petroleum industry to determine whether federal legislation is needed to regulate its marketing practices. In the 94th Congress, the Senate passed S. 323, which would have limited the ability of major market shareholders to increase the number of their company-operated retail outlets. This bill exempted independent refiners such as Ashland and Commonwealth from the definition of "major market shareholders." Also in the 94th Congress, the House of Representatives considered H.R. 13000, which would either have declared a two-year moratorium on openings of refiner-operated retail outlets or have imposed an elaborate system of functional accounting to identify profits earned by the different branches of integrated companies.[29]

None of these proposals was enacted, due in part to the opposition of the Federal Trade Commission and the Federal Energy Administration. *See* H. R. Rep. No. 94-

[29]The current Congress is considering similar proposals. S. 323 has been reintroduced as S. 19 by Senator McIntyre, again with an exemption for independent refiners. Senator Durkin has introduced S. 743, which pursues the concept of functional pricing contained in H.R. 13000. Hearings were held on both proposals on May 25, 1977, by the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources.

1615, 94th Cong., 2d Sess. (Sept. 18, 1976). The FEA noted, for example, that

> FEA opposes a marketing moratorium which would restrict either the gasoline volume or the total number of refiner operated retail outlets. Any such moratorium would seriously interfere with competition in the marketplace and would encourage continuance of some inefficient operations . . . .
>
> Applying the lessons we have learned from over two years of price and allocation controls we find that, unfortunately, there are no easy solutions. Legislation designed to specifically prohibit unfair pricing practices often results in either restricting competition or the ability of a franchisor to expand his business to whatever extent market conditions might allow. *Id.* at 36.

It is unnecessary for this Court in this case to determine what adjustments in established petroleum marketing patterns are necessary or appropriate in the national interest. The issue presented here is far narrower. That issue is whether Maryland may restrict producers and refiners of petroleum to a single method of retail distribution within its borders when the practical effect of this restriction is to exclude an entire class of refiner-marketers from doing business in the State.

We submit that Paragraphs B and C of the Maryland Motor Fuel Inspection Law are wholly inconsistent with "the Commerce Clause's overriding requirement of a national 'common market.'" *Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2445. Accordingly, we ask that the judgment of the Court of

Appeals of Maryland sustaining the constitutionality of those provisions be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEES

OPINIONS BELOW

The appellees adopt the summaries of the Opinions Below which appear in the appellants' briefs.

JURISDICTION

The appellees adopt the statements of Jurisdiction which appear in the appellants' briefs.

STATUTES INVOLVED

The appellees adopt the statements of the Statutes Involved which appear in the appellants' briefs.

QUESTIONS PRESENTED

1. Whether Paragraphs B and C of the Maryland Act, which prohibit the direct operation of retail service stations within the State of Maryland by producers or refiners of petroleum products, constitute an unlawful discrimination against or an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Paragraph C of the Maryland Act deprives appellant Continental Oil Company of its property without due process of law.

3. Whether Paragraph D of the Maryland Act is in conflict with the Robinson-Patman Act, or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Robinson-Patman Act, and thus is void under the Supremacy Clause of the United States Constitution.

4. Whether Paragraph D of the Maryland Act constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

A. Introduction.

This case is before the Court on direct appeal from the judgment of the Court of Appeals of Maryland upholding the validity of Chapter 854 of the Laws of Maryland of 1974, as amended by Chapter 608 of the Laws of Maryland of 1975, codified as Md. Ann. Code art. 56, §§157E(b)-(h) (1972 Repl. Vol. 1976 Cum. Supp.), (hereinafter "the Act" or "the Maryland Act") under the Constitution and laws of the United States.

The Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service

station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

(Italicized portions added by Chapter 608 of the Laws of Maryland of 1975).

The appellants in this case are, with two exceptions,[1] large, multi-national, fully-integrated oil companies involved in all four basic levels of the petroleum industry: production (of crude oil), refining, transportation and marketing. All of the appellants are engaged in company-operated retail marketing operations in the State of Maryland. The appellees include, in addition to the State of Maryland itself, the Governor, Attorney General and Comptroller of the Treasury of the State.

B. The Proceedings Below.

This litigation was commenced when Exxon Corporation, prior to the effective date of the Act, instituted suit on June 17, 1974, in the Circuit Court for Anne Arundel County, Maryland, seeking declaratory and injunctive relief from a host of alleged constitutional and statutory infirmities in the Act. (A. 10-28). Over the next nine months eight additional parties filed a total of six suits challenging the Act on the same or similar state and

[1] Commonwealth Oil Refining Company, Inc. and Petroleum Marketing Corporation (a wholly owned subsidiary of Commonwealth (A. 444)) are not engaged in the production of crude oil. Kayo Oil Company (a wholly owned subsidiary of Continental Oil Company (A. 358-59)) is engaged solely in retail operations. (A. 349).

federal constitutional grounds. (A. 36-49, 57-75, 85-103, 112-126, 136-144).[2] All cases were consolidated for purposes of trial.[3]

Motions for partial summary judgment with respect to Paragraphs D and F of the Act were filed by appellants Shell and Exxon on May 29, 1975, and by Gulf on June 19, 1975. (A. 153-55, 156-61, 161-63). The State answered on July 7, 1975 (A. 163-71), and a hearing on these Motions was held on August 22, 1975.

Trial convened on October 14, 1975, and prior to opening statements by counsel, the trial judge granted appellants' Motions For Partial Summary Judgment as to Paragraph D. The trial court held that provision to be in conflict with and preempted by provisions of the Robinson-Patman Act. (J.A. 49a-51a). Trial continued on the validity of the remaining portions of the Act and concluded on October 20, 1975. The evidence adduced at trial was relevant to Paragraphs B and C of the Act, and included the testimony of thirteen (13) witnesses, affidavits of additional witnesses in lieu of live testimony, and numerous exhibits. The evidence detailed the various types of retail operations engaged in by the appellants in Maryland, investments in such facilities, supply of product, pricing, etc. Five experts testified as to their opinion concerning the effects of the Act upon competition and the consumer in Maryland. Significant evidence was also introduced as to the

[2] The Bill of Complaint in *Commonwealth Oil Refining Company, Inc., et al. v. Govenor of Maryland, et al.* Equity No. 22,551 (March 19, 1975) has not been printed in the Appendix.

[3] On May 5, 1975 (on July 24, 1975, for Petroleum Marketing Corporation), the trial court entered an Order prohibiting state officials from enforcing the provisions of the Act against the appellants while the cases were pending and at the same time prohibiting appellants from opening and operating retail service stations on a company operated basis without first notifying the State of their intention to do so. (A. 151-153).

history and purpose of the Act, including testimony and materials presented to the Legislature. (J.A. 7a-10a).

On January 27, 1976, the Circuit Court for Anne Arundel County entered a final judgment and decree declaring the statute violative of the Due Process and Equal Protection Clauses of the federal Constitution and invalid as a taking of appellants' property without just compensation. (J.A. 53a-134a). The challenge to the Act under the Commerce Clause was rejected by the trial court. (J.A. 123a). The Maryland Court of Appeals unanimously reversed the decision of the trial court and the Act was upheld against all constitutional challenges on February 18, 1977. (J.A. 1a-44a). Following the denial of motions for reconsideration and for stay of the mandate by the Maryland Court of Appeals on April 13, 1977, (J.A. 45a-48a) and entry of judgment by the trial court declaring the Act constitutional and valid, the appellants filed these appeals.

On October 3, 1977, this Court noted probable jurisdiction of the appeals. Appellants collectively challenge the validity of Paragraphs B, C and D of the Act. Paragraphs B, C and D are challenged as being invalid under the Commerce Clause. Additionally, appellants Continental and Kayo challenge Paragraph C of the Act as being an improper exercise of the State's police power, constituting a deprivation of property without due process of law. Finally, Paragraph D of the Maryland Act is challenged as being in conflict with and preempted by the Robinson-Patman Act.

C. Facts Material To The Questions Presented.

(a) *Retail Marketing of Petroleum Products in Maryland.*

1. Supply of gasoline products to Maryland.

No crude oil is produced or refined into motor fuel in the State of Maryland. (J.A. 19a). All fuel sold in the State is produced and refined from locations outside the

State and transported into Maryland by pipeline, vessel or truck. (A. 194, 212, 214, 216, 223-24, 231, 255, 258). Motor fuel which enters the State is generally delivered to storage facilities located in Maryland, and from there it is transported to retail service station facilities. However, as the trial court noted in turning away the appellants' Commerce Clause challenge to the Act:

> This member of the court remains unconvinced that the act . . . would unduly burden interstate commerce.
>
> * * * *
>
> *In this case the flow of petroleum products into the State is not sought to be regulated or curtailed. The statute seeks merely to impose more stringent control over its sale after it enters its boundaries.* The law would merely assert a new ramification with regard to an industry which the State has already regulated, and the industry, up to now, has taken scant, if any, measures to assert this objection. (J.A. 123a) (emphasis added).

2. The nature and composition of the marketplace.

In Maryland, petroleum products are purchased by local retail customers, as well as by through-state travelers and transportation companies. (A. 196, 228-29). Historically, the retail marketing of petroleum products in the State of Maryland has been a highly competitive industry. (J.A. 13a, 99a). The consumer is served by various kinds of retail gasoline service stations which vary in method of operations and ownership, and in products and services offered. (A. 187). Service stations in Maryland include: (1) conventional retail service stations having several gasoline pumps, one or more service bays, and offering tires, batteries and accessories, (2) major service centers, (3) service stations combined with carwash facilities, (4) turnpike stations, (5) truck stops, (6) gasoline-only

stations offering limited or no automotive services, and (7) full and partial self-service stations. (A. 187).

The largest portion of retail marketing of gasoline is performed by independent service station dealers. (A. 190-91). Certain of these individual dealers own their own service stations or lease them from someone other than their supplier of petroleum products and sell petroleum products acquired under a supply contract with a branded or unbranded supplier. (J.A. 98a). The remainder of independent service station dealers, however, lease their station facilities and equipment from their supplier of petroleum products. (J.A. 98a). Another portion of retail marketing of gasoline is carried on directly by suppliers of petroleum products through their employees, employees of a subsidiary company or commissioned agents. (J.A. 98a).

Retail service stations generally fall into one of two categories: (a) "major brand stations" or (b) private or "secondary brand stations." (J.A. 98a). The general characteristics of a major brand conventional service station are: the offering of well-known, advertised brand-name products, the availability of repair services, acceptance of credit cards and the utilization of essentially "non-price" competition, including games and give-aways. (J.A. 98a). Most major brand stations are operated by independent retail service station dealers. (J.A. 99a). The general characteristics of a private brand or secondary brand station are: the offering of generally not well-known brand-name products, limited or no use of advertising, the acceptance of no credit cards and the offering of limited or no automotive repair services. (J.A. 98a-99a). The emphasis on price as a marketing tool is generally greater than at major brand stations. (J.A. 99a). Most private or secondary brand service stations are directly operated by suppliers or independent marketers of petroleum products with company employees. (J.A. 99a).

The supply shortage which existed during the time the Act was being considered was found most directly to affect the independent marketers of unbranded or privately branded gasoline who, as sources of supply became limited, experienced increases in prices to levels at which competition with major brand supplied stations was virtually precluded. (J.A. 8a, 14a; A. 271-74, 292-93). While there are service stations which do not fit into the above-described patterns, the vast majority of service stations do. (J.A. 99a).

3. Changes in the marketplace, 1972-77.

Evidence of the fact that "the retailing of petroleum products in the State of Maryland is a highly competitive industry" (J.A. 99a, Brief for Exxon at 8) is, in part, demonstrated "by the number and location of available facilities. . . ." (J.A. 99a). However, as was stipulated at trial, the total number of retail service stations in Maryland had been steadily declining through the period of 1972 through 1974. (A. 188). Furthermore, the facts demonstrated that independent dealer operated stations were being converted to company operations. (J.A. 14a).

For example, during the period of 1972-74, one company doing business in Maryland, BP Oil Corporation, Inc., had, pursuant to a predetermined marketing plan (A. 765-67, 773, 778-79, 785-90), converted previously independent dealer operations (and/or constructed) and put into operation forty-two company operated gasoline-only service stations within the State. (A. 189). The dealers at several of these locations were given the option of switching to an unknown and unadvertised brand-name product at a different location or accepting a position as a company employee. (A. 781-84, 809-11). During the trial, Gulf Oil Corporation admitted that it planned to convert or construct and put into operation a total of 22 company-operated facilities

in Maryland within the next five years (19 of which locations were currently being operated by independent dealers). (A. 226). As of July 1, 1974, there were approximately 233 company-operated service stations in Maryland. (A. 190-91). A total of 179 of these were directly operated by producers or refiners doing business in the State. (A. 189).

This trend of a decline in the total number of retail service stations in Maryland and of a corresponding increase in the number of company-operated stations has continued unabated throughout the course of this litigation. As stipulated at trial, the number of service stations in Maryland had declined from 3,995 in 1972 to 3,757 in 1974. (A. 188). As of January, 1977, the total number of service stations in the State had further declined to 3,631. (State's Memorandum of Points and Authorities In Opposition To Appellees' Motion For Stay Of Mandate in the Court of Appeals at 10).[4] On the other hand, there has been an increase of approximately 39% in the number of producer or refiner company-operated stations in Maryland from 179 in July, 1974 (A. 189) to 248 as of January, 1977. (State's Memorandum of Points and Authorities In Opposition To Appellees' Motion For Stay of Mandate in the Court of Appeals at 10).[5]

(b) *Legislative History of the Act.*

The record below demonstrates that the Act became law only after several months of concern, study and investigation of gasoline marketing practices in Maryland by the Legislative and Executive branches of Maryland government. Extensive Legislative hearings and debates were conducted. A special veto hearing was

[4] These figures are based on the 1977 registration records of the Gasoline Tax Division of the Comptroller's Office.

[5] *Id.*

held by the Governor prior to final approval of the legislation. (A. 183-87; J.A. 7a-10a).

This very deliberate governmental process began when, by letter dated June 13, 1973, the Governor of Maryland requested the Comptroller of the Treasury to conduct a study of gasoline retailing in Maryland to determine whether the then existing shortage was real or contrived and whether or not company-operated service stations received more favorable allocations of gasoline than did independent service station dealers. (Defendants' Exhibit A; A. 687-88, 543-44). Pursuant to said request, a survey questionnaire requesting a broad range of information on such marketing factors as: price changes, supply and allocation quotas, hours of operation, "voluntary allowances" (temporary gasoline price reductions granted to dealers by suppliers), other types of dealer aid, and sales limitations to customers was prepared by the Gasoline Tax Division of the Comptroller's Office under the supervision and direction of John K. Coleman, Chief of the Gasoline Tax Division, and Arthur E. Price, Chief Motor Fuel Inspector. (Defendants' Exhibit B; A. 689-93, 544-45). According to the testimony of Mr. Coleman, this survey questionnaire was prepared in cooperation with Mr. Price and his staff, some members of which had been previously employed in the industry. (A. 545). It was their collective opinion that the material requested in the survey would assist the Governor in determining whether the complaints that he had been receiving as to shortages at some retail stations were valid. (A. 545, 578-79).

On June 29, 1973, this questionnaire was mailed to 4,055 registered gasoline service station dealers in the State of Maryland. (A. 183). A total of 1,407 questionnaire returns, completed in whole or in part, (34.7% of those mailed) were received by the Gasoline Tax Division. (A. 183). The individual responses of the

dealers to the questionnaire were tabulated onto worksheets by the staff of the Gasoline Tax Division and summary tables of those responses, entitled "Recap by Brand," were prepared. (A. 183). From these materials, additional information gained from field investigations made during the period of the survey, telephone calls from service station dealers and their personal knowledge of the industry (A. 579-80), Messrs. Coleman and Price prepared a written analysis entitled "Results and Analysis of Service Station Dealers Questionnaire."[6] (Defendants's Exhibit D; A. 698-704, 547-49). This report did not attempt to draw any specific conclusions regarding the principal questions raised by the Governor; it merely reflected, with comment, the information and data received from dealer responses and left any conclusions to be drawn therefrom to the Governor. (A. 580). The report was submitted to the Governor on September 6, 1973.[7] (A. 185).

[6] A review of the report entitled "Results and Analysis of Service Station Dealers Questionnaire" demonstrates that the individual responses to said questionnaire were grouped in categories based upon the nature of the retail service station operation expressed in terms of ownership of property, brand of supplier and method of operation. Four such categories were designated: (1) Major Oil Company Owned, Leased to Dealer; (2) Privately Owned, Operated Under Major Brand; (3) Unbranded (including privately owned, marketing product under private name brand); and (4) Company Operated. The discussion contained under each category reflected information and data collected only from those dealer responses placed in that category. This report was introduced into evidence on the ground that it constituted part of the legislative history of the Act, because it was presented to both Senate and House committees considering those bills which eventually became the Act. (A. 186).

[7] A supplemental report entitled "Analysis of Comparative Report of Taxable and Exempt Gasoline Sales for the Calendar Year 1971, 1972 and First Six Months of 1973" was also submitted in the mailing. This analysis was prepared from computer data regularly collected by the Gasoline Tax Division of the Comptroller's Office. (A. 184-85, 709-720).

Also pursuant to the Governor's request of June 13, 1973, the Gasoline Tax Division of the Comptroller's Office prepared and mailed on July 17, 1973, a questionnaire to twenty major oil companies operating in the State. (A. 184). This questionnaire sought data and information on company activity in the State in such areas as: retail service station operations, new and planned service station construction and method of operation, past and projected sales volumes, allocation formulas, closings of various types of stations, cancellations and/or non-renewals of contracts, price increases to customers, elimination of voluntary allowances, rental abatements or other dealer aid, hours of operation of branded service stations and acquisition of new toll-road accounts. (Defendants' Exhibit C; A. 694-97, 546). Only nine oil companies responded in whole, and two responded in part, to the major oil company questionnaire. (A. 184). These responses were reviewed and analyzed by Messrs. Coleman and Price who then prepared a report thereof entitled "Analysis of Major Oil Companies Questionnaires" in the same general fashion as they had prepared the report on responses to the dealer questionnaire. (A. 580-81). This report was submitted to the Comptroller who forwarded it to the Governor on September 28, 1973. (A. 184). As with the dealer questionnaire, the oil company questionnaire did not reach any conclusions as to whether or not the shortage was real or contrived; the information was simply gathered and submitted to the Governor for his use. (A. 581, Defendants' Exhibit E; A. 705-08, 550).

Subsequent to the submission of the dealer report to the Governor, the Chief of the Gasoline Tax Division, at the direction of the Comptroller, drafted a bill to correct certain inequities thought by the Comptroller to be reflected in the returns of the service station dealer questionnaires. (A. 185, 575-76). In its Memorandum of Opinion, the trial court stated that, upon examination of Mr. Coleman by the Court, that it was Mr. Coleman's

personal opinion that he didn't feel it was necessary to draft the Act. (J.A. 116a). A careful reading of that examination by the Court, however, reveals no such testimony. Mr. Coleman merely stated he *didn't previously testify* that he felt the Act was necessary. He did testify that the Comptroller believed the Act to be necessary, but expressed no personal opinion as to the necessity of drafting the Act one way or the other. (A. 575-76). A copy of the proposed legislation was sent to the Governor by the Comptroller on September 13, 1973, and again on January 7, 1974, following discussions with the Governor and his staff. (A. 185).

Identical bills were subsequently introduced in the Marvland Senate (S.B. 465) and House of Delegates (H.B. 918). (A. 185, Defendants' Exhibits H and I; A. 724-28, 558). During consideration of these bills by the Legislature, both were amended to limit the prohibition on the operation of retail service stations to producers and refiners by deleting the term "wholesaler." (A. 185-86). Paragraph G was added by amendment to both bills to permit the Comptroller to adopt rules and regulations defining the circumstances in which a producer or refiner might temporarily operate a previously dealer-operated station. (A. 185-86). Finally, Paragraph H was added by amendment to S.B. 465 permitting the Comptroller to grant reasonable exceptions to the specified divestiture dates in the Act. (A. 185-86).

Public hearings were held on both bills by the Senate and House committees to which they were referred for consideration. (A. 186). At the public hearing on S.B. 465, before the Senate Economic Affairs Committee held on February 20, 1974, a total of sixteen witnesses (8 opponents, 8 proponents) registered to appear and testify on the bill. (A. 186). The following were represented among the opponents: Exxon Corporation, BP Oil Corporation, Inc., Shell Oil Company, the

Maryland Petroleum Association and the Maryland Oil Jobbers Council. (A. 186). James E. Grady, Public Affairs Manager for Exxon Corporation, according to a prepared statement left with the Committee, denounced as unfounded charges that company operation of retail service stations promoted inequitable product allocation, dealer lease cancellations and the perpetuation of give-away programs or that company stations are used to control prices. He stated that direct operation provided the most efficient, least costly method of satisfying consumer demand. (Defendants' Exhibit K-1; A. 729-38, 576-77). Mr. Grady left a nearly identical statement with the House of Delegates considering the House Bill. (Defendants' Exhibit K-2; A. 738-46, 576-77). At public hearings on H.B. 918 before the House, held on March 7, 1974, a total of seven witnesses registered to appear and testify on the House Bill. (A. 186). In addition to Mr. Grady of Exxon, a representative from Shell Oil Company testified against the bill and also left a prepared statement with the House committee. (Defendants' Exhibit K-3; A. 746-54, 576-77).

Among the proponents at both the Senate and House hearings was the Comptroller of the Treasury for the State of Maryland. He testified in favor of the bills and submitted copies of the aforementioned reports prepared by his office at the request of the Governor. (A. 186; Defendants' Exhibit D; A. 698-704, Defendants' Exhibit E; A. 705-20).

Following these hearings and favorable action with amendments by the committees, both the House and Senate bills were passed by the General Assembly. (A. 186). Senate Bill 465, which was eventually signed into law as Chapter 854 of the Laws of Maryland of 1974, was passed by the Senate without a dissenting vote. (A. 186).

After the General Assembly had passed both S.B. 465 and H.B. 918, the Governor announced a special veto

hearing to be held on May 29, 1974. He invited for his consideration the views and testimony of proponents and opponents to the legislation. At that special hearing, a total of fifteen witnesses registered to appear and testify. Seven witnesses registered as opponents to the bill, representing at least five oil companies and segments of the business community. Eight witnesses registered to appear and testify as proponents of the measure. (A. 186-87). S.B. 465 was signed into law by the Governor on May 31, 1974. (A. 187).

SUMMARY OF ARGUMENT

I.

PARAGRAPHS B AND C OF THE MARYLAND ACT FULLY COMPORT WITH THE COMMERCE CLAUSE AND NEITHER DISCRIMINATE AGAINST NOR UNDULY BURDEN INTERSTATE COMMERCE.

It is clear that notwithstanding an "effect" upon interstate commerce, *Cf. Perez v. United States,* 402 U.S. 146 (1971); *Wickard v. Filburn,* 317 U.S. 111 (1942), state regulation of internal commercial and business affairs does not offend the Commerce Clause where there is no discrimination against interstate commerce and such effects are not "clearly excessive" in relation to the statute's putative local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960). The prevention of destructive competition is a wholly appropriate state legislative function. *Parker v. Brown,* 317 U.S. 341 (1943); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346 (1939). Paragraphs B and C of the Maryland Act violate no prohibition of the Commerce Clause.

These provisions do not discriminate against interstate commerce. By its terms the Act applies equally to all producers and refiners of gasoline, leaves unaffected "interstate" independent marketers allowing them to

continue company operated retail service stations within the state, and does not impinge upon the operation of "interstate" refiners engaged in retail operations through dealer run service stations. No nexus between interstate as opposed to local interests inheres in the production or refining of petroleum; the nature of interstate commerce when "taken in conjunction with the inherent character" of the regulation effects no such discrimination. *Compare, Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940). Nor do these provisions discriminate against interstate commerce by curtailing the flow of interstate goods. *See, Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.,* 341 U.S. 329 (1951); *Breard v. City of Alexandria,* 341 U.S. 622 (1951).

The Act differs in *kind* from the burdens found to inhere in statutes invalidated by this Court. The case belongs to a line of decisions in which statutes regulating "essentially local" activity have been sustained notwithstanding their incidental effect upon interstate commerce. *See, e.g., Milk Control Board v. Eisenberg Farm Products; Parker v. Brown; Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1937). The Act by its terms only restricts producers and refiners from pursuing the alternative of company owned stations as a method of retail marketing. Sales through independent marketers remain untouched and distribution through the wholesale market is not addressed by the strictures of the law. Accordingly, the Maryland Act should be upheld as a proper exercise of the state's police power.

II.

PARAGRAPH C DOES NOT DEPRIVE CONTINENTAL OIL COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The Maryland Act falls well within the power of the Maryland General Assembly to respond to practices which it deems injurious to the state's "internal commercial and business affairs." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934). The Legislature attempted to preserve and enhance competition within the Maryland retail gasoline market by prohibiting producers and refiners of petroleum from directly operating retail service stations. The evil that the legislature perceived in such direct operations by vertically integrated oil companies is a proper subject for legislative treatment, *FTC v. Sun Oil Company*, 371 U.S. 505, 528 (1963), and the propriety of the means chosen by the legislature is attested to by similar proposals enacted by or introduced in numerous state legislatures and Congressional "divestiture" proposals. *See, e.g.*, H.R. Rep. No. 1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 1005, 94th Cong., 2d Sess. (1976). The judgment that the concentration of economic power in 179 retail service stations presently operated by vertically integrated companies would not be in the best interest of Maryland citizens is peculiarly within the legislative province. This Court has made clear that it will not substitute its "social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. at 730. Continental does no more than to ask this

Court to pass upon the "wisdom" of the Maryland statute. It is submitted that Paragraph C and the Act *in toto* may stand under the Due Process Clause of the Fourteenth Amendment.

III.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Applying the proper federal standards for determining whether a state statute unconstitutionally conflicts with a federal statute, the Court of Appeals of Maryland properly held that Paragraph D of the Maryland Act (which requires that all "voluntary allowances" be granted uniformly on a statewide basis) does not conflict with Section 2(b) of the Robinson-Patman Act. Following the procedure established by this Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479-80 (1974), the Maryland court examined the purposes and objectives of both laws and found them to be identical. (J.A. 41a).

By defining "voluntary allowances" as used in Paragraph D to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer" (J.A. 35a), the lower court interpreted the statute so as to allow an oil company to meet a lower price actually offered to its dealer by a competing oil company. Thus, Paragraph D was held not to impinge upon the operation of the Section 2(b) defense in those situations where oil companies share customers.

As a general rule, however, oil companies do not share retail dealer customers. Because it had construed "voluntary allowance" to include the ordinary situation in which an oil company lowers its price to its captive dealer customer in response to a price cut by a competing oil company to that company's dealer, the

Court of Appeals of Maryland was compelled to supply an answer to the question left open by this Court in *FTC v. Sun Oil Co.*, 371 U.S. 505, 512 n.7 (1963). The answer provided was clearly correct and fully supportive of federal antitrust policy.

In reaching its conclusion that Section 2(b) is not available for voluntary allowances, the lower court carefully examined the leading pre-*Sun Oil* decision of this Court interpreting that defense, *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951). Not surprisingly, the court found that *Standard Oil* presumes the existence of a "shared customer" to be a prerequisite to the invocation of Section 2(b).

To find the Section 2(b) defense available in the absence of a shared customer would require this Court to embrace the "conduit theory" of meeting competition which it expressly rejected in *Sun Oil*, and totally abandon the rationale of its prior decisions which narrowly construed that antitrust exemption. To now expand the scope of Section 2(b) so as to accommodate the special needs of the oil industry, brought about by their reliance upon exclusive dealing agreements, would be to return to the earlier "meeting competition" defense which the Robinson-Patman Act repealed. Moreover, the loose construction of an antitrust defense urged by appellants Exxon, Phillips, Shell, and Gulf, and now encouraged by the Federal Trade Commission, would burden severely the statutory interface uniting the Robinson-Patman Act and the Sherman Act, 15 U.S.C. § 1 (1975).

The primary-line liability which appellants fear is imaginary and gratuitous because Paragraph D is inoperable in those situations in which oil companies share customers. Similarly, liability for competitive injury to competing customers (secondary-line liability) resulting from compliance with Paragraph D is illusory.

The possibility of secondary-line injury within Maryland is precluded by the operation of the state statute under challenge. Any potential for secondary-line injury at Maryland's geographic borders may be avoided totally by "feathering," a pricing concept suggested by this Court in *Sun Oil*.

Finally, the acceptance of the construction of Section 2(b) urged by appellants, together with the market realities of exclusive dealing as practiced by them, would present very substantial policy problems resulting from the "good faith" requirement of that defense. Were Paragraph D to be struck down as unconstitutionally conflicting with Section 2(b), this Court impliedly would have placed its imprimatur on "good faith" price verification accomplished by discussions between competitors. Such a result seriously would inhibit interbrand price competition between oil companies and foster the spread of exclusive dealing to unrelated industries.

IV.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE COMMERCE CLAUSE.

The power residing in the federal government to regulate interstate commerce "does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 140 (1973). Paragraph D regulates sales which take place wholly within the borders of the State of Maryland. As such, it contains no constitutional infirmity based on commerce. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). No different result is mandated merely because the product originates outside the state which regulates its price. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974).

Any extra-territorial effect of Paragraph D is *de minimis* and clearly avoidable by "feathering." This, combined with the fact that Paragraph D applies equally to gasoline produced within and without Maryland, precludes any finding of undue burden on interstate commerce.

ARGUMENT

I.

PARAGRAPHS B AND C OF THE MARYLAND ACT FULLY COMPORT WITH THE COMMERCE CLAUSE AND NEITHER DISCRIMINATE AGAINST NOR UNDULY BURDEN INTERSTATE COMMERCE.

It is beyond question that State regulation of "internal commercial and business affairs," is a proper exercise of the police power. *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955). Such legislation which does not "discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 448 (1960); *Hennington v. State of Georgia,* 163 U.S. 299 (1896); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346 (1939). Maryland "unquestionably possesses an interest in preserving competition within the retail gasoline marketing industry"[8] and the effect of Paragraphs B and C upon commerce is incidental to the regulation of "essentially local" activity. *Compare, Milk Control Board v. Eisenberg Farm Products,* 306 U.S. at 352. Accordingly, the Act must be upheld unless the burden upon commerce is *clearly excessive* in relation to the putative local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Parker v. Brown,* 317 U.S. 341 (1943); *Milk Control Board v. Eisenberg Farm Products,*

[8] Brief of appellant Continental Oil Co., *et al.*, No. 77-12, at 43.

306 U.S. 346 (1939); *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1937).

This case is markedly different with respect to both the nature of the interest advanced by the State in support of the Act and its effect upon interstate commerce from those cited by the appellants in their effort to overturn the judgment of the Maryland Court of Appeals. Attack upon the statute is premised upon the argument that while the statute accords even-handed treatment on its face to all producers and refiners of petroleum, it has the effect of discriminating against interstate commerce. *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940). Reliance upon this authority is misplaced. In these cases "the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between those two classes of commerce generally speaking impossible." *Nippert,* 327 U.S. at 432. *Accord, Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 69 (1963). *Compare, Brimmer v. Rebman,* 138 U.S. 78 (1891); *Minnesota v. Barber,* 136 U.S. 313 (1890). The fact that oil is neither presently refined nor produced in Maryland does not, *ipso facto,* render the Maryland statute discriminatory against interstate commerce. The Court of Appeals properly noted, that "[w]hile oil is not produced in Maryland, and is not presently being refined in Maryland, there are producers or refiners which are Maryland corporations, or are headquartered here, or have substantial facilities here, or do a significant portion of their business here. All such '"Maryland"' businesses are prohibited by the Act from operating retail service stations." (J.A. 19a, 20a). No nexus between interstate as opposed to local interests inheres in the production or refining of petroleum. Not only does the Act by its

terms apply equally to all producers and refiners of gasoline, but it permits and indeed encourages interstate non-integrated marketers of gasoline to continue or initiate retail operations through company-owned stations and leaves unaffected the dealer run operations[9] of "interstate" refiners. This statute does not protect local producers from their out-of-state counterpart by seeking to "eliminate both competitive and economic advantages" that have brought a competing state industry "nationwide acceptance" of its goods. *Hunt v. Washington State Apple Advertising Commission,* ___U.S. ___, 97 S. Ct. 2434, 2445 (1977). The Maryland Act is not so parochial; nor is it an attempt by Maryland to isolate its own economy. *Dean Milk,* 340 U.S. at 354. The "evil" at which the Act was aimed and the means chosen by the Legislature to fulfill its objective are clearly legitimate. "The General Assembly, after considering the activities of producers and refiners in the industry, concluded, as have several congressional committees, that the recent trend of increased direct operation of service stations by producers and refiners, if allowed to continue, could

[9] Hudson Oil Company at the time of the enactment of the law represented the prototype of the "pure marketer" of gasoline whose operations were not included within the Act's proscriptions. Hudson's operations span 36 states through 315 retail service stations. (A. 516). Similarly, prior to its merger with Commonwealth, PMC served as another example of an "interstate" marketer of petroleum. (A. 449). At present such "interstate" marketers continue to exist within the State and may engage in the direct operation of company-owned service stations under the Act. (A. 190-91, 569). The law does not affect the dealer-run operations of such "interstate" refiners as Crown Central Petroleum Corporation and Hess, which compete with branded service station dealers. (A. 190-91). *See, also,* Brief of *Amicus Curiae* Champlin Petroleum Company, *et al.,* at 3 n. 4. It is submitted that the line drawn at the direct operation of retail service stations by producers and refiners of gasoline is not one drawn in favor of local as opposed to interstate interests. Indeed, the Act has the effect of inducing such interstate competitors into the Maryland market. (A. 591).

substantially decrease competition and lead to the control of that market by a few major oil companies." (J.A. 19a). *See, FTC v. Sun Oil Co.,* 371 U.S. 505, 528 (1963); H.R. Rep. No. 94-1762, 94th Cong., 2d Sess. 28 (1976); H.R. Rep. No. 1423, 84th Cong., 1st Sess. 17 (1955). The prevention of such destructive competition is a wholly appropriate legislative function, *Nebbia v. New York,* 291 U.S. 502 (1934); *United States v. Rock Royal Co-op., Inc.,* 307 U.S. 553 (1939); *Sunshine Anthracite Coal Co. v. Atkins,* 310 U.S. 381 (1940), permissible under the Commerce Clause. *See, e.g., Eisenberg Farm Products* and *Parker v. Brown.* "[G]uarding against out of state competition is a very different thing from curbing competition from whatever source." *H.P. Hood & Sons v. DuMond,* 336 U.S. 525, 570 (1949) (Frankfurter, J. dissenting). The Act, neither in purpose[10] nor effect, serves "to protect Maryland interests from out-of-state competition." (J.A. 19a).

Nor does the Act prohibit or curtail the flow of interstate goods. *Compare, H.P. Hood & Sons v. DuMond,* 336 U.S. 525 (1949); *Baldwin v. G.A.F. Seelig,* 294 U.S. 511 (1935); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951). In rejecting the challenge that state regulation has impermissibly discriminated against interstate commerce, this Court has found that distinction controlling. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission,* 341 U.S. 329 (1951). *Compare, Breard v. City of Alexandria,* 341 U.S. 622 (1950).

In *Panhandle,* the appellant "natural gas company" transported that commodity in interstate commerce for distribution and sale in the State of Michigan. Appellee was a public utility of that state which distributed gas

[10] The legislative history of the Act fully supports the Court's conclusion that "[t]here is every indication that the purpose of the statute was to preserve competition within the retail gasoline marketing industry in Maryland." (J.A. 19a).

to domestic, commercial and industrial consumers in and around the City of Detroit and obtained its entire supply of natural gas from the appellant. In response to Panhandle's proposal to secure large industrial customers for the direct sale of natural gas in Michigan, the Michigan Public Service Commission issued an order requiring the company to obtain a certificate of public convenience and necessity before engaging in such direct sales. Noting that the end result of the order "might be the prohibition of particular direct sales," (341 U.S. at 331) by Panhandle, the Court rejected the argument that the company's right "to compete for the cream of the volume business without regard to the local public convenience or necessity," (*Id.* at 334) was embodied in the Commerce Clause:

> It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certified utility where the public convenience and necessity would not be served by direct sales. That there is neither discrimination nor prohibition here saves this regulation from the rule of such cases as *Hood and Sons v. DuMond,* . . . where a state was said to have discriminated against interstate commerce by *prohibiting* it because it would subject local business to competition. And the statute under which the Michigan Commission acted does not distinguish between an interstate or intrastate agency desiring to operate in a locality already served by a utility. *Id.* at 336-37 (citations omitted) (emphasis added).

Appellants here distribute their goods in the retail market through sales to jobbers, wholesalers or independent marketers. (A. 11, 197; 58, 86; 113, 137; 213, 463). The statute does not operate as a "prohibition" nor does it distinguish between an "interstate or intrastate" company desiring to operate within the Maryland retail market.

Similarly, in *Breard,* the Court rejected the argument that a local ordinance constituted a discrimination against interstate commerce where the goods of interstate solicitors were not denied entry within municipal borders. The City of Alexandria, Louisiana, by ordinance required door-to-door salesmen to obtain the consent of residents before engaging in such solicitation. Although the statute on its face applied equally to out-of-state and in-state sellers, appellants nevertheless argued that the law placed "an undue and discriminatory burden upon interstate commerce . . . in effect . . . tantamount to a prohibition of such commerce," favoring the operation of local retail merchants. 341 U.S. at 635. Rejecting appellant's argument that the fact that the statute imposed significant financial burdens upon its operations constituted an undue burden upon interstate commerce,[11] the Court held:

> [T]he usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally immaterial and a matter for adjustment at the local level in the absence of federal legislation . . . . Taxation that threatens interstate commerce with prohibition or discrimination is bad, . . . but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason. 341 U.S. at 638.

The flow of appellants' product is not prohibited or curtailed by the Maryland statute—the "usual methods of seeking business are left open by the ordinance." *Id.*

Indeed, the effect of the Maryland statute upon appellants' operations differs in *kind* from the burdens

[11] It is apparent that the economic effect upon appellant's operation was substantial. Notwithstanding the Court's rejection of the company's constitutional claims, it was fully aware that compliance with the statute might well be "too costly and the results negligible." 341 U.S. at 635, 636 n. 11.

found to inhere in statutes invalidated by previous decisions of this Court. The Act has absolutely nothing to do with the interstate transportation, sale or movement of gasoline. It prohibits gasoline stations in Maryland from being operated directly by vertically integrated oil companies. The law is directed, at a "wholly intrastate activity" (J.A. 18a),[12] and the case belongs to a line of decisions in which state statutes regulating "essentially local" activity have been sustained notwithstanding their incidental effect upon interstate commerce. *See, e.g., Milk Control Board v. Eisenberg Farm Products,* 306 U.S. at 352; *Parker v. Brown,* 317 U.S. at 361; *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1936). The Maryland Act is not directed to exclusively interstate transactions. *Compare, H.P. Hood & Sons v. DuMond; Baldwin v. G.A.F. Seelig;* and *Eisenberg,* 306 U.S. at 353, nor does it constitute a regulation "of interstate commerce itself." *Lemke v. Farmers Grain Co. of Embden,* 258 U.S. 50 (1922); *Shafer v. Farmers Grain Co. of Embden,* 268 U.S. 189 (1925). *See, H.P. Hood & Sons,* 336 U.S. at 537. The law is not to be condemned as an enactment "aimed solely at interstate commerce attempting to affect and regulate the price to be paid . . . in a sister state." *Eisenberg,* 306 U.S. at 353; *Baldwin v. G.A.F. Seelig,* 294 U.S. 511 (1935). Maryland has not used "the threat of economic isolation as a weapon to force a sister state to enter into even a desirable reciprocity agreement," *Great Atlantic and Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 379 (1976), nor has it mandated that "business operations . . . be performed in the home

[12] The conclusion of the Court of Appeals that the Act was directed at a "wholly intrastate"activity is no more "patently erroneous," Brief of appellant Ashland Oil Inc., *et al.,* at 18, than this Court's judgment in *Parker v. Brown,* 317 U.S. at 361. The Maryland Court was fully aware of the reach of federal legislative jurisdiction, *Perez v. United States,* 402 U.S. 146 (1971); *Wickard v. Filburn,* 317 U.S. 111 (1942). (J.A. 20a-21a).

state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 145 (1970); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Toomer v. Witsell,* 334 U.S. 385 (1948). The Act does not effect a prohibition on the flow of interstate goods. *Brimmer v. Rebman,* 138 U.S. 78 (1891); *Minnesota v. Barber,* 136 U.S. 313 (1890). Commerce is not taxed, in a discriminatory manner or otherwise. *Boston Stock Exchange v. State Tax Commission,* ___ U.S. ___, 97 S. Ct. 599 (1977); *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940). Against the backdrop of such precedent, appellants' claims of "undue burden" appear exaggerated.

Immediately apparent is the fact that the "prohibition against refiner operation of retail service stations will have little effect on the major brand stations. . . ."[13] It is patent from the record that these oil companies may effectively "monitor consumer preferences" and test "innovations in marketing methods" through dealer-operated stations. (A. 337-38, 485-87). Indeed, innovation in the industry has typically come from outside of such "main-stream" actors. (A. 592, 340). The "thrusts of price competition" will not take place from the major-owned, company-operated stations. (A. 489, 588-90). Assuming, *arguendo,* that the efforts of Exxon, Phillips, Shell and Gulf to "enhance brand acceptance" through company participation in the full range of retail offering, and to provide "dealer training," will be somehow impaired by the operation of the Act, it is submitted that such "burdens" do not pose a problem of constitutional dimension. Appellants'

[13] Brief of appellant Ashland Oil, Inc., at 15.

"dealer operated" stations are not touched by the law; the operation of other major oil companies is totally unaffected.[14] The Act does not place a "straight jacket" upon an entire industry. *Compare, Toomer v. Witsell,* 334 U.S. 385 (1948). Rather Exxon, Phillips, Gulf and Shell rely on the putative effects of the statute upon Kayo, Commonwealth and Ashland. It is submitted that the impact of the statute upon these companies is insufficient to vitiate Paragraphs B and C.

Kayo is the wholly-owned subsidiary and marketing arm of Continental Oil Company which operates in Maryland exclusively through company-operated stations.[15] (A. 214). Continental also sells gasoline in the wholesale market. (A. 213). Commonwealth and Ashland are refiners of petroleum[16] marketing gasoline at retail through company-owned and operated stations and competing as well in the wholesale market. Other independent refiners, such as Hess and Crown operate at retail in the Maryland market through independent dealers. (A. 190-91). Tenneco Oil Company, also an independent refiner, has no retail stations in the state and markets solely at wholesale. (A. 191, Brief of *Amicus Curiae* Champlin Petroleum Company, et al. at 5 n. 7). Although Continental and Ashland maintain they cannot remain in the market by structuring their operations to utilize independent dealers, neither company has definitely eschewed that course of

[14] Other major oil companies operating in the State, such as Texaco (307 stations), Union Oil (152 stations), and Sun Oil Company (225 stations), use independent dealers exclusively. Brief of appellant Ashland Oil, Inc., *et al.*, at 7. (A. 190-92).

[15] Continental does, however, market branded "Conoco" gasoline in other states, through conventional stations. (A. 212).

[16] Ashland, Commonwealth, Hess, Crown and Tenneco are five members of a "class" of independent refiners recognized in the petroleum industry. (A. 376, 386).

action.[17] Assuming, *arguendo,* that Continental and Ashland will choose to "abandon the sale of petroleum products at retail in the market if they cannot operate retail stations," that impact does not reach constitutional proportions. While "certain actors in the system will find it unattractive to enter the Maryland market," the effect of the Act will be to induce other competitors to enter. "Non-integrated marketers would tend to be prime customers for those stations." (A. 591-93). Moreover, there will be no significant impact upon the flow of petroleum into Maryland on the wholesale market. The operation of other wholesalers presently acting within the market is not restricted.[18] While Kayo maintains that it may not remain in operation unless dealer stations are used, Continental has not alleged that the statute will impair its ability to supply gasoline to the wholesale market. Although Commonwealth, through its marketing distributor PMC, questioned at trial its ability to maintain its wholesale operation should the Act take effect, it has sold its company-operated stations and intends to continue selling gasoline "at wholesale in the State if conditions

[17] The Court of Appeals correctly concluded that these companies did not make a "firm decision" to withdraw. While the President of Kayo testified that he saw "no alternative but to close the stations," no formal decision had been made by Kayo and no decision had been made at all by Continental Oil Company, the parent of that wholly-owned subsidiary regarding the operation of retail stores through dealers in Maryland. (A. 358-60). The Vice President of Ashland Petroleum Company testified that they would not choose dealer operation "if there were any other alternative open." (A. 508). As PMC sold all of its retail stations, the effect of this statute upon such operations is no longer at issue. Brief of appellant Ashland Oil, Inc., *et al.*at 14 n. 15.

[18] In addition to Tenneco Oil Company (Brief of *Amicus Curiae* Champlin Petroleum Company, *et al.* at 5 n. 7) the record reveals wholesale operations by all of the major oil companies who are parties to this suit. (A. 11, 197, 58, 86, 113, 137, 213, 463).

permit."[19] While Ashland maintained that the assured outlets which they acquired through the use of company-operated stations were of benefit to their wholesale marketing within the State, they as well did not maintain that they would not continue the wholesale marketing of gasoline.[20] The assertion that 32 companies belonging to a class of independent refiners, none of whom presented testimony at trial, would be adversely affected from entering the market at either the wholesale or retail level was wholly speculative. (A. 412). "There are obviously examples of independent refiners who are not marketers who prosper." (A. 625). "On balance the problem of entry is not a serious consequence of this law." (A. 593). Every exercise of the police power will affect interstate commerce to some degree, *Cf. Wickard v. Filburn*, — that the Act would create positive disincentives for certain firms that do business in the State and positive incentives for others to withdraw cannot stand alone as the constitutional litmus under the Commerce Clause. Interference with the flow of gasoline across state lines, if any, is *de minimis* and permissible as an incident to the regulation of the retailing of gasoline. *Parker v. Brown*, 317 U.S. at 367; *Head v. New Mexico Board*, 374 U.S. 424

[19] Brief of appellant Ashland Oil, Inc., *et al.* at 14 n. 15.

[20] Ashland's President stated that the result of the statute *could* jeopardize their position in the wholesale market (A. 509), and admitted that Ashland had never investigated the possibility of finding potential buyers in the market for all of its refined product. (A. 511). Ashland's expert witness testified that it would be "very difficult" to operate at wholesale, stating "[y]ou may have a wholesale account one day and because of a fraction of a penny a gallon, he may leave and go to someone else. . . ." (A. 531). The argument positing the necessity for such "assured outlets" reduces itself to no more than the proposition that such independent refiners seek to avoid actual price competition in the distribution of their products in the wholesale market — a proposition that the state submits is not embraced within the commands of the Commerce Clause.

(1963); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Miller v. California*, 413 U.S. 15, n. 25 (1973). "That such methods do not produce as much business . . . is, constitutionally, immaterial and a matter for adjustment at the local level in the absence of federal legislation." *Breard*, 341 U.S. at 638.

The interest asserted by the state is substantial. The evil inuring in the active pursuit of forward vertical integration by oil companies into local retail marketing at the expense and detriment of independent businessmen was recognized by this Court in *FTC v. Sun Oil*, 371 U.S. at 528. Noting that such a program might "be a greater evil," than the price discrimination there at issue, this Court remarked that it "saw no evidence that such forward vertical integration is inevitable or required." *Id.* That unlikely occurrence has come to fruition in the State of Maryland. During the last five years the total number of retail service stations in Maryland has been constantly declining. (A. 188, State's Memorandum of Points and Authorities In Opposition to Motion for Stay of Mandate in the Court of Appeals at 10). In the last three years there has been a 39% increase in the number of producer or refiner company-operated stations. *(Id.,* A. 189). Such companies intend to continue such forward vertical integration. (A. 226). Direct company operation by major oil companies provides an efficient vehicle for accomplishing the "maintenance of the long range and generalized price rigidity," condemned in *Sun Oil*, 371 U.S. at 523. Testimony at trial was adduced that the Act was procompetitive, in effect, denying producers the power to focus windfall profits obtained from crude prices and assuring that gasoline will flow in the wholesale market to the truly independent marketer (A. 594) who serves as the "only source of aggressive price competition" in the retail gasoline market. (A. 588-90). Maryland is not merely seeking to "enhance" the reputation

of its local producers, *Pike v. Bruce Church, Inc.*, nor does it seek to advance a laudible goal through legislation contradictory to its purpose. *Compare, The Great Atlantic & Pacific Tea Co. v. Cottrell*, and *Hunt v. Washington State Apple Commission*. This court has long recognized the issues of federalism underlying its review of state statutes not only under the Due Process Clause of the Fourteenth Amendment, but under the Commerce Clause as well. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939); *Parker v. Brown*. As this court stated in *Eisenberg*:

> Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the State law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable correlaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. 306 U.S. at 351-52.

The Maryland legislation which neither discriminates against interstate commerce nor disrupts its required uniformity may stand under the Commerce Clause.[21]

[21] It is apparent from the briefs of appellants and the nature of the Act that the Maryland statute which regulates the retail sale of gasoline within the state does not create any barrier to the flow of interstate goods or the operation of interstate business which may run afoul of the uniformity requirement of the Commerce Clause. *Compare, Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968). Nor do the federal antitrust laws provide any alternative for addressing the problems of vertical integration in the petroleum industry. *See*, Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 Vand. L. Rev. 1277, 1326-31 (1975). The Senate Judiciary Committee, in its *Report on the Petroleum Industry Competition Act of 1976*, characterized the efficacy of federal antitrust enforcement in dealing with major oil companies as follows:

> "The record of the past 80 years of antitrust enforcement makes painfully obvious that we do not have an adjudicative procedure that is, on the one hand, sufficiently expeditious and effective, and on the other, sufficiently insulated from political effects of economic power to deal with the competitive structure of the petroleum industry. To propose that such issues be litigated is, in effect, to propose that they be consigned to bureaucratic oblivion. S. Rep. No. 1005, 94th Cong., 2d. Sess. 124 (1976).

II.

PARAGRAPH C OF THE ACT DOES NOT DEPRIVE CONTINENTAL OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Continental Oil Company stands alone in its challenge to the Maryland statute on "substantive" Due Process grounds. (Continental and Kayo Jurisdictional Statement No. 77-12 at 13-18; Brief of appellant Continental Oil Company, *et al.* at 15-28). Readily conceding that scrutiny of the wisdom of the Act has been foreclosed "by the Court's prior decisions in Due Process cases," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934); (Brief of appellant Continental Oil

Company, *et al.* at 11). Continental nevertheless renews the argument, unsuccessfully presented to the Maryland General Assembly, that Paragraph C of the Act bears no relation to its objective of preserving and enhancing competition in the retail sale of gasoline. The state does not maintain that this Court should "abandon" federal review of state economic legislation under the Fourteenth Amendment; rather, it maintains that the Act *rationally* serves its stated purpose. The "caution and restraint," counseled by the "Lochner era," *Moore v. City of East Cleveland, Ohio,* ___ U.S. ___, 52 L. Ed. 2d 531, 539 (1977), is applicable to judicial review of the Legislature's "means" as well as its "end." "The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has as a manifest tendency to cure or at least to make the evil less." *Liggett Co. v. Baldridge,* 278 U.S. 105, 115 (1928) (Holmes, J. dissenting); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. at 167.

Appellant's access to the legislative process prior to the enactment of Chapter 854 cannot be gainsaid. In response to the gasoline crisis of 1973, the Comptroller of the State Treasury directed questionnaires designed to elicit information relevant to the operation of the retail gasoline market to Maryland's 4055 registered service station dealers and to the 20 major oil companies operating within the state, including Continental and Kayo. (A. 183, 184). On the basis of the information obtained, identical bills were introduced into both houses of the Maryland General Assembly prohibiting producers and refiners of petroleum from directly operating retail service stations. Public hearings were held on both bills; at both hearings the major oil companies were fully represented and expressed their views in opposition to the Act. Following the passage of the Act, opponents including representatives of five

major oil companies again presented their views at a special veto hearing held by the Governor. (A. 185-87). At odds with the Legislature's judgment of the public welfare, Continental raises its substantive Due Process claims in this Court. Appellees submit that Continental Oil Company, like Exxon and Gulf corporations, Phillips Petroleum Company and Shell Oil Company, "is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

Appellant's attack upon the statute does not conform to the standard of review of state economic regulation under the Fourteenth Amendment evidenced by the decisions of this Court. State legislatures may "within extremely broad limits control practices in the business-labor field," *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423 (1952). The Legislature was presented with evidence that producers and refiners of gasoline were favoring company-operated stations in the allocation of gasoline; that as a result some service station dealers were forced to close; and that the major oil companies were engaged in a process which could lead to their control of the gasoline market through the use of company owned stations. (J.A. 19a). The Legislature responded by enacting a law which prohibited the direct operation of company owned stations by such vertically integrated companies. Expert testimony was adduced to the effect that the Act would "increase the competitiveness of the gasoline market" and therefore "increase the benefits that accrue to the driving public that come from the increase in competitive activity." (A. 588). Such expert testimony concluded that the Act would aid competition by denying producers and refiners the power to focus windfall profits from crude

prices upon their competitors (A. 594) and by increasing the amount of gasoline available to independent non-integrated companies (A. 627) who because of their smallness and geographical diversity provide the only source of "aggressive price competition" in the retail gasoline market. (A. 590). The Act bears a rational relation to its legislative end. The Legislature could rationally conclude that the concentration of economic power inherent in the direct operation of the *existing* 179 retail service stations by producers and refiners of gasoline within the State would not be in the best interest and welfare of its citizens. The evil addressed has been recognized as a proper subject for legislative treatment by this Court, *FTC v. Sun Oil Co.*, 371 U.S. at 528, and the propriety of the means chosen has been attested to by the introduction of similar legislation in numerous state legislatures and the deliberations of Congressional committees. *See, e.g.*, H. R. Rep. No. 1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 1005, 94th Cong., 2d Sess. (1976). It is submitted that the Act *in toto*, and Paragraph C in particular, cannot be characterized as "palpably in excess" of the legislative function. *West Coast Hotel Co. v. Parrish*, 300 U.S. at 398.

Continental's reliance upon *Moore v. City of East Cleveland, Ohio*, is particularly misplaced. There the Court in striking down East Cleveland's housing ordinance restricting dwelling occupancy to a narrowly defined family unit was fully aware of the issues of federalism and the separation of legislative and judicial functions underlying the litany of "substantive" Due Process decisions:

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era

> demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilictions of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary — the boundary of the nuclear family.
>
> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." . . . Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. 52 L. Ed. 2d at 539-40.

The Maryland law does not run afoul of any "specific federal constitutional prohibition." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. at 536. The Act does not "cut deeply into private areas of protected family life." *Moore*, 52 L. Ed. 2d at 542 (Brennan and Marshall, JJ. concurring).

Continental has admitted that business conduct "deemed inimical to the public welfare, although not violative of the anti-trust laws" is a proper subject for state regulation. (Continental and Kayo Jurisdictional Statement No. 77-12 at 11 n. 14). The strictures of the Fourteenth Amendment are not heightened in cases where there is "no suggestion of any monopoly or monopolistic practice." *Nebbia v. New York*, 291 U.S. at 531. There is no "closed class or category of businesses affected with a public interest." *Id.* at 536. This Court has made clear that State "legislatures have constitutional authority to experiment with new techniques," and are entitled "to their own standard of the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S.

at 423. The case does not present a situation in which a protected liberty is "infringed by a law having no purpose or utility whatsoever." *Moore v. City of East Cleveland, Ohio,* 52 L. Ed. 2d at 567 (Stewart and Rehnquist, JJ. dissenting). It is submitted that the Maryland Act may stand under the Due Process Clause of the Fourteenth Amendment.

III.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

One question presented by appellants Exxon, Phillips, Shell, and Gulf is whether Paragraph D of the Maryland Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Robinson-Patman Act, or otherwise frustrates federal antitrust policy as reflected in the objectives of the Robinson-Patman Act and its Section 2(b) interface with the Sherman Act. Consequently, a brief overview of those objectives seems appropriate.

By enacting the Robinson-Patman Act, Congress sought to eliminate the more pernicious aspects of intrabrand price discrimination. The maximizing of intrabrand price rigidity was perceived as beneficial to competition because it would insure price uniformity in sales from a common seller to merchant buyers of the same brand. The free enterprise system was thought best to be maintained and promoted by having intrabrand competitor merchants purchase products from the same supplier at the same price. In this manner, the commercial success of merchants purchasing from a common seller would be a direct function of their efficiencies, and injury to interbrand competition through predatory intrabrand pricing would be minimized. S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3, 7 (1936).

Congress was aware that in the long run intrabrand price rigidity in the absence of monopoly would stimulate interbrand price and product competition; relaxation of this rigidity was sought only where its maintenance presumably would be at the expense of interbrand competition. The intersection of these two types of competition was determined by Congress to be the point where the intrabrand price restraint promoted by the Robinson-Patman Act should yield to the interbrand price freedom favored by the Sherman Act. To secure this interbrand preference, Congress enacted Section 2(b) of the Robinson-Patman Act.

By noting probable jurisdiction in this appeal this Court has assumed the burden of defining the boundaries of the intersection of intrabrand price rigidity and interbrand price flexibility. These boundaries will determine which transactions are entitled to a Section 2(b) defense.

Appellees submit that the point of intersection is denoted by the existence of one buyer whose business is solicited directly by more than one seller. By so interpreting Section 2(b), the ability to engage in localized price response is secured for those sellers who trade on the open, interbrand market and denied to those sellers who, having opted for exclusive dealing agreements, do not. This was the answer given by the Court of Appeals of Maryland to the question left unanswered by this Court in *FTC v. Sun Oil Co.,* 371 U.S. 505 (1963). (J.A. 32a-41a). As the following argument will demontstrate, the answer supplied was clearly correct and fully supportive of federal antitrust policy.

A. THE COURT OF APPEALS OF MARYLAND APPLIED THE APPROPRIATE FEDERAL STANDARDS IN DETERMINING THAT NO CONFLICT EXISTS BETWEEN PARAGRAPH D AND SECTION 2(b) OF THE Robinson-PATMAN ACT.

Paragraph D of the Maryland Act pertains to the manner in which "voluntary allowances" are to be granted within the state. Paragraph D states:

> "(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied." (J.A. 2a).

The appellants attacked the validity of Paragraph D by alleging that it conflicted with Section 2(b) of the Robinson-Patman Act. Section 2(b) exempts a seller from liability under Section 2(a) if the seller's discriminatorily lower price was offered in a good faith attempt to meet "the equally low price of a competitor" of the seller. In essence, appellants attacked Paragraph D on the ground that it prohibited, except on a statewide basis, a form of competitive price response permitted by Section 2(b) only on a local basis.

In response to this challenge the Court of Appeals of Maryland embarked upon an examination of the purposes and objectives of both laws (as mandated by this Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479-80 (1974)) fully prepared, in the event that it found an actual or potential conflict, to "reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *DeCanas v. Bica*, 424 U.S. 351, 357-58 n.5 (1976).

No conflict was found to exist between the two statutes. In examining the purposes of Paragraph D, the court below found that it

> was intended to prevent the practice of localized price discounts, the Legislature believing that all retail service station dealers of the same brand should be treated equally. This is consistent with other provisions of the Act which are intended to eliminate discrimination against retail dealers by their suppliers. (J.A. 35a).

This finding caused the court below to define "voluntary allowances" as "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer." (J.A. 35a). By employing a definition of "voluntary allowance" which comported with the legislative history of Paragraph D and appellants' affidavits, the court below reconciled the purposes of the Maryland statute with those of Section 2(b) and thereby eliminated the only point of obvious potential conflict between the two.

The conflict so eliminated was the situation where an oil company would desire to lower its price in response to an equally low price actually offered to its dealer-customer by a competitor, and would desire to do so only with respect to that dealer. An oil company confronted with such a circumstance clearly could respond and rely upon Section 2(b) to exempt it from liability under Section 2(a). By defining "voluntary allowance" so as not to include that type of price response, the court below ensured that Paragraph D would not impinge upon the operation of Section 2(b) in that situation.

The construction given to the term "voluntary allowance" did not eliminate, however, a potential conflict which was both obscure and all encompassing. A lower price offered by Exxon to an Exxon dealer in

response to an equally low price offered by Shell to a Shell dealer was clearly a "voluntary allowance" and thus subject to Paragraph D. (J.A. 36a). Whether such a price response was permissible under Section 2(b) was less clear. Thus, the court below was compelled to determine whether the two statutes were in conflict by examining the purposes and objectives of Section 2(b) and, ultimately, providing its answer to the question left open by this Court in *FTC v. Sun Oil Co.*, 371 U.S. at 512 n.7.

B. The Court of Appeals of Maryland was correct in determining that no actual or potential conflict exists between Paragraph D and Section 2(b) of the Robinson-Patman Act and that the objectives of Paragraph D and federal antitrust policy are harmonious.

The question of whether a seller is ever entitled to invoke the Section 2(b) defense with respect to a customer who has not been and will not be offered the equally low price which the seller desires to meet is, to a certain extent, a question of first impression for this Court. The Court first was urged to decide this very question by the Federal Trade Commission in *Sun Oil.* The Commission's theory was that the offering of a lower price to one of Sun's dealer-customers by a wholesale competitor of Sun "was a prerequisite to Sun's invocation of the §2(b) defense. . . ." 371 U.S. at 529 n.19. Sun's method of marketing gasoline through exclusive agreements with its dealers of course precluded the possibility that any such offer would be made.

The formal position of the Commission at that time was to

> allow one who has invited suspicion as to his motives by indulging in localized price-cutting to escape the sanctions of Section 2(a) of the Clayton Act only when his full and strict qualification under the Section 2(b) proviso indicates the legitimacy of his motives: *i.e.*, that a specific competitor of his had previously offered a specific customer *of his* a lower price, and that he thereupon attempted to meet that price. Brief for Federal Trade Commission at 44, *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963) (emphasis added).

This Court found that the facts presented in *Sun Oil* showed only that McLean (Sun's dealer-customer) was being undersold by Super Test (McClean's retail competitor); there was no showing that Super Test had purchased gasoline at a price lower than that paid by McClean. Consequently, this Court decided the case before it on the assumption "that Super Test was not the beneficiary of any enabling price cut from its own supplier." 371 U.S. at 512.

> Were it otherwise, i.e., if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier — presumably a competitor of Sun — we would be presented with a different case, as to which we herein neither express nor intimate any opinion. 371 U.S. at 512 n.7.

The definition given by the Court below presents that "different case."

Prior to the *Sun Oil* decision, only one lower federal court had considered the precise question presented here; the case was *Enterprise Industries v. Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). Despite appellants' claim that "the district court's ruling in *Enterprise* is limited to the 'precise' issue resolved in *Sun*" (Brief for appellants Exxon Corp., *et al.* at 70), the district court stated that "Texas could justify discrimination only by a showing that it dropped its price to the other stations *to meet an*

equally low price made available to those other stations by a competing oil company." 136 F. Supp. at 421 (emphasis added).

Subsequent to the *Sun Oil* decision only one[22] lower federal court has focused directly upon the precise question presented here; the case is *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972). Mr. Justice Clark, sitting by designation, opined that for Section 2(b) to be available to a seller, the lower price need not actually be offered to the customer of the seller who claims the defense. Although that ruling was advisory to the district court on remand of the case, it certainly was intended to answer the question reserved in *Sun Oil* and squarely presented here. To determine whether that question was properly answered in *Bargain Car Wash*, resort must be made, as was made by the court below, to *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), the only major pre-*Sun Oil* decision of *this* Court to focus upon the Section 2(b) defense.

There is no room for doubt that *Standard Oil* presumed that the existence of a "shared customer" was a prerequisite to the invocation of Section 2(b).

[22] The other post-*Sun Oil* lower federal cases which appellants view as focusing on that precise question shed very little light on it. For instance, *Bunty v. Shell Oil Co.*, [1972] Trade Reg. Rep. (CCH) ¶74,252 (D.Nev. 1972) is unclear as to whether its holding was based upon the Section 2(b) defense or a failure to show injury to competition. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965), in no way was dispositive of Section 2(a) liability because the lower court's ruling pertained only to motions to quash *subpoenas duces tecum*. And appellants concede that *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), and *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973), are not clear holdings as to the availability of the Section 2(b) defense. (Brief for appellant Exxon Corp., *et al.* at 68 n. 34).

There, the respondent had sold gasoline to "jobbers" at lower prices than to individual service stations, although these jobbers sometimes sold at retail themselves or resold to retail dealers at prices below those normally available to individual service stations. The record showed that each sale at a "lower price" to a jobber had been made to meet an equally low price offered that jobber by one of the company's competitors.

* * * *

The Court's entire discussion of the Section 2(b) defense was in terms of a seller's matching a lower price *actually offered* to his customer by one of his (the seller's) competitors. Thus, "if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under §2(b), in making a counteroffer * * *" (340 U.S. at 244). Further: "if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential * * * to meet that price rather than to lose the customer" (340 U.S. at 249). Again: "plain language and established practice * * * [permit] a seller, through §2(b), to retain a customer by realistically meeting in good faith the price offered to that customer" (340 U.S. at 250). The Court went on to explain why the Section 2(b) defense is economically justified when the seller's customer has actually received an offer from the seller's competitor: for then the seller's other customers will be no more harmed by the seller's equaling the lower price for the favored customer than they would be if he had not done so and the favored customer had accepted his competitor's offer (*ibid.*).

It thus seems fair to read the *Standard Oil* decision as having made explicit what was implicit in the statutory language: that the Section 2(b) defense is available only to a seller who has matched a lower price actually offered to his buyer by a competing seller. Brief for Commission in *Sun Oil* at 29, 30 (emphasis and bracketed material in original).

The assumption of a shared customer similarly seems to run through this Court's decision in *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), in which emphasis was placed upon "individual competitive situations, rather than upon a *general system of competition.*" 324 U.S. at 753 (emphasis added). Without the existence of a shared customer as a requisite to Section 2(b) invocation, that defense would approach the breadth of the earlier "meeting competition defense" contained in former Section 2 of the Clayton Act. 38 Stat. 730.

As appellees stated in their Motion to Dismiss or Affirm, Respondent Sun presented this Court in *Sun Oil*

> with a theory that the requirement of having a "shared customer," so that there would be a price which could be met, was satisfied by looking beyond the oil company's immediate customers (the independent dealers) to the ultimate customers (the consumers). This "conduit theory," conjured up to accommodate the exclusive dealing practices of major oil companies, would have created the legal fiction that the consumer, rather than the dealer, is the "shared customer." The Court expressly rejected the "conduit theory" because it was designed to overlook the existence of those persons the Robinson-Patman Act was enacted to protect, specifically, the small, independent businessman. Appellees' Motion to Dismiss or Affirm at 17.

One need look no further than the undisputed facts of the record below to see that appellants seek to resurrect the rejected "conduit theory." According to the appellants' own testimony they grant a voluntary allowance (a discriminatory reduction in price) to their dealers to permit the dealers, in turn, to reduce the dealers' retail price to meet a competitive retail price being posted by competing branded dealers who have received price reductions from their suppliers. (Brief for appellants Exxon Corp., *et al.* at 18; A. 673-74). Appellants argue that this is necessary because without the ability to

grant such voluntary allowances their branded dealers, under such circumstances, would "quickly lose sales" and, in due course, "would go out of business." (Brief for appellants Exxon Corp., *et al.* at 64-65).

Beyond question, these facts demonstrate that the mechanism involved in "meeting the equally low price" contemplates a two-stage price reduction effected by two separate economic units at different levels of distribution. Because the retail dealer receiving the voluntary allowance is an "independent businessman" (Brief for appellants Exxon Corp., *et al.* at 64), there can be no means (absent an illegal price fixing agreement) by which the supplier can assure that the voluntary allowance, or any part of it, will be passed on and reflected in the recipient dealer's retail price. 371 U.S. at 524 n.14. And, as this Court has stated in *Sun Oil*, neither the language of the Section 2(b) proviso nor its legislative history contains any implication that Section 2(b) "comprehends a two-stage price reduction effected by two separate economic units at different levels of distribution."[23] 371 U.S. at 516. Moreover, these facts demonstrate no more than that the retail dealer who is the recipient of the voluntary allowance might be hurt (by lost retail sales) and might eventually go out of business if he did not receive the discriminatory price reduction from his supplier. This alone is not enough to trigger a Section 2(b) response. This Court has specifically found that "the defense [Section 2(b)] *does not* become applicable *simply because the favored purchaser would be hurt absent the discriminatory price cut* to him [by his supplier]. If a *threat of harm to the favored customer* was itself enough, under §2(b), to

[23] Rejecting Sun's broader interpretation of Section 2(b) the Court went on immediately to note that this "narrower interpretation of the statute [Section 2(b)] is consonant with overall rationality and broader statutory consistency and purpose, and effects a result compatible with legislative history and economic reality." 371 U.S. at 516.

immunize a discrimination, the §2(b) exception could largely nullify the prohibitions of §2(a)." 371 U.S. at 520 (emphasis added).

Not surprisingly, appellants place much reliance on the FTC's *Report on Anticompetitive Practices in the Marketing of Gasoline,* 3 Trade Reg. Rep. (CCH) ¶10,373 (1967).[24] They also place reliance upon the Department

[24] *See,* Note, *Gasoline Marketing and the Robinson-Patman Act,* 82 Yale L.J. 1706, 1713 n.44 (1973):

> The Federal Trade Commission's current reading of the §2(b) defense has a rather tortuous history, the Commission having reversed its position twice on the issue. Before the *Enterprise* decision the Commission thought the §2(b) defense would in some cases be available to a company supplier even though there was no competition for sales to his dealers. *See Hearings on Distribution Problems Before Subcomm. No. 5 of the House Comm. on Small Business,* [H.R. Rep. No. 1423], 84th Cong., 1st Sess., pt. 2, at 852-53 (1955). But in Senate hearings on gasoline price wars in 1955, the Commission declared its earlier view to be a "mistake" and embraced the *Enterprise* holding. *Hearings on Gasoline Price War in New Jersey Before a Subcomm. of the Senate Select Comm. on Small Business,* [H.R. Rep. No. 1423], 84th Cong., 1st Sess., pt. 2 at 450-51 (1955). The *Senate Report* following the hearings concluded that the failure of the Commission to prevent price discrimination was a substantial cause of the chaotic marketing conditions under investigation. Armed with the *Enterprise* decision, the *Report* said, the Commission "should move promptly against any major supplier still granting discriminatory price allowances." S. Rep. No. 2810, 84th Cong., 2d Sess., 28 (1956). The Commission did just that in *Sun Oil,* urging the Supreme Court to adopt the *Enterprise* doctrine.
>
> After its limited victory in *Sun Oil,* however, an entirely new set of Commissioners declared a general amnesty for oil companies then under complaint and decided to hold still more hearings on gasoline marketing practices. S. Oppenheim & G. Weston, II *The Lawyer's Robinson-Patman Act Sourcebook* 1182 (1971). In 1967 the Commission issued a report on its hearings. By a 3-2 vote the Commission reversed itself again, abandoned the *Enterprise* doctrine and enunciated its more lenient current position. Neither the hearings nor the *Report* focused on the *Enterprise* doctrine. Indeed, the *Report* failed even to mention the *Enterprise* decision or the FTC's former support for it in *Sun Oil. See,* 3 Trade Reg. Rep. (CCH) ¶10,373 (1967).
>
> However, it seems clear that the Commission has not totally abandoned the *Enterprise* doctrine. In January, 1973, the Commission issued a complaint against Standard Oil Co. of Ohio. Proposed relief included a ban on supplier sales to its dealers *at other than a uniform wholesale price* throughout an appropriate competitive area. 3 Trade Reg. Rep. (CCH) ¶20,134, complaint issued Jan. 31, 1973, *id.* at ¶20,208 (1973).

of Justice's recent *Report on the Robinson-Patman Act,* 93-97 (1977). Each of these "reports" would make Section 2(b) available for voluntary allowances. Because both agencies are charged with responsibilities for enforcement of the Robinson-Patman Act, appellants argue that the reports should be given great weight. Unfortunately, these reports reflect little more than the abdication of that responsibility by those agencies. They represent "fashionable" legal and economic theory which would substitute the view of their authors regarding the evil of price discrimination for that of Congress. As the Commission itself stated, engrafting a special exemption upon Section 2(b) to satisfy the unusual needs of the oil industry "not only renders the statute unworkable and indefinite but reopens the debate on basic economic policy that Congress sought to resolve by passing the Act." (Brief for Commission in *Sun Oil* at 45 n. 27).

Antitrust policy in general and Congressional intent in particular will not be served by this Court construing Section 2(b) in such a way as to allow oil companies to arrogate to themselves the right to meet a price offer which they deny their captive customers the ability to entertain. To do so would be wrong.

As appellants correctly state, " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " Brief for appellants Exxon Corp., *et al.* at

68, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). The mere fact that the interpretation urged by the two agencies rejects strict construction of an antitrust exemption constitutes an indication that it is wrong. *Abbott Labs v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1 (1976). Where, however, that interpretation has encouraged the invocation of that defense by an oil company, upon "the *plausible* belief that it was conforming to its legal obligations" (*Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) (emphasis added)) "there are *compelling* indications that it is wrong" and that the Court of Appeals of Maryland was correct.

C. Compliance with Paragraph D of the Maryland Act exposes appellants to neither primary-line nor secondary-line liability under Section 2(a) of the Robinson-Patman Act.

In order for a seller to be exposed to potential liability for injury caused to a competing seller resulting from price differentials (primary-line injury) the price which causes injury must have been offered to a customer shared or solicited by the two sellers. Not surprisingly, appellees can cite no authority for this contention. Nor is it surprising that appellants can cite no authority against it; neither appellants nor appellees have been able to uncover any instance where primary-line liability has been assessed absent the existence of a shared customer.

To support their gratuitous imposition of liability, appellants cite: *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 35 (7th Cir. 1976); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 956-57 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *H.J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452, 464 (S.D.N.Y. 1960); and

In re Forster Manufacturing Co., 62 F.T.C. 852 (1963), *rev'd and remanded*, 335 F.2d 47 (1st Cir. 1964), *upon remand*, 68 F.T.C. 191 (1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Each of these decisions clearly indicates the existence of a shared customer. In *Holleb*, the court stated that:

> [f]rom the evidence in the record, a jury could conclude that where Holleb and Produce Terminal *were competing for the same customers* and where the defendant violated the Clayton Act to obtain and retain customers, an injury to primary line competition would result. 532 F.2d at 35 (emphasis added).

In *Atlas Building* the court noted "that this builder and other builders thereupon ceased to purchase blocks from appellee and thereafter purchased all of their blocks from the appellant." 269 F.2d at 956. In *H.J. Heinz Co.*, the record showed that "42 of the 45 [supermarkets] carried Beechnut. On the other hand, 23 of these 45 chains had discontinued Heinz and 6 or 7 had never carried Heinz." 181 F. Supp. at 458. In *Forster*, the injured seller, Farmington, sold "directly to large users including Armour & Co." 335 F.2d at 52. Forster, charged with causing primary-line injury to his competitor Farmington, "gave a 5% discount to . . . Armour & Co. . . . ." *Id.* at 53. *Hampton v. Graff Vending Co.*, 478 F.2d 527 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973), similarly relied upon by appellants, seems impliedly to find the shared customers by noting that "the fact that 90% of Hampton's business is wholesale indicates that this is his true position in the distributive scheme." 478 F.2d at 532.

The total absence of any case establishing the liability which appellants view as preordained by their compliance with Paragraph D is also probably attributable in great part to the peculiarities of their marketing structure. Ordinarily, a customer's supplier is not his landlord as well; the converse is true, however, in

gasoline marketing. Not infrequently, part of the rent charged to a captive gasoline dealer by his supplier is based on the gallonage the dealer purchases. Also not infrequently, the gallonage "rent" varies, on a per gallon basis, according to the total monthly volume purchased by the dealer. The inevitable fluctuation in the true per gallon price (the tankwagon price plus the "per gallon rent") would make it highly unlikely that a supplier could ever establish the fact of primary-line injury.

It would seem that to establish a primary-line injury case resulting from the grant of a "voluntary allowance" a seller would need to establish:

> 1) that the true per gallon price was discriminatorily low;
>
> 2) that the captive dealer who received the lower price *agreed* to pass-on some portion of it to the consumers (albeit the allowance is "*voluntary*") and the amount so passed-on;
>
> 3) that the dealer supplied exclusively by the seller claiming injury similarly would have passed-on some part of an enabling price cut had he received one, and the amount he would have passed-on; and
>
> 4) the additional gallonage, if any, the complaining seller would have sold but for the voluntary allowance.

Although this Court's recent decision in *Illinois Brick*, ___ U.S. ___, 97 S. Ct. 2061 (1977), did not involve price discrimination, its rationale of simplifying antitrust suits by disallowing recovery for injury "to business or property" occasioned by "passing-on" would seem incapable of accommodating appellants' hypothetical. *Id.* at 2070-71. Moreover, step (2) constitutes vertical price fixing. *FTC v. Sun Oil Co.*, 371 U.S. at 424 n.14; *Bolick-Gillman Co. v. Continental Baking Co.*, 278 F.2d 649, 650 (9th Cir. 1960).

In sum, the necessities of antitrust policy as enacted by Congress and developed by this Court demand the existence of a shared customer not only for invocation of Section 2(b), but also for a finding of primary-line injury under Section 2(a).

The specter of potential liability for secondary-line injury is easily dispelled. Due to the operation of Paragraph D, the problem could present itself only at the state borders. Appellants concede that "a feathered extension of the Maryland allowance to adjoining states might lessen potential secondary-line liability by lessening the chance of secondary-line competitive injury. . . ." (Brief for appellants Exxon Corp., *et al.* at 78 n.41). It would appear, however, that feathering would accomplish more than appellants concede; it would *eliminate* the possibility of secondary-line competitive injury.

D. Paragraph D of the Maryland Act is not inconsistent with the full purposes and objectives of Congress in enacting the Robinson-Patman Act.

Appellants urge that Paragraph D "must be struck down on the *independent* ground that it nullifies the accomplishment and execution of the full purposes and objectives of Congress in enacting Sections 2(a) and 2(b) of the Robinson-Patman Act." (Brief for appellants Exxon Corp., *et al.* at 79, 80 (emphasis added). Thus, appellants argue for preemption albeit they do not use that word.

In *DeCanas v. Bica*, 424 U.S. 351 (19[illegible] this Court refused to find a California statute pertaining to [illegible]on-resident aliens preempted by the federal Immigration and Naturalization Act, 8 U.S.C. §1101 *et seq.* (1970). In so doing, the Court applied a three step test for determining whether a state law is to be held preempted by a federal law. Under that test, preemption is not

found unless 1) Congress has clearly indicated an intent to regulate the field exclusively; 2) the field is one requiring exclusive federal regulation; or 3) the state law is in actual or potential conflict with the federal law and preemption is necessary to protect the achievement of the aims of the federal law. *See, also, New York Department of Social Services v. Dublino,* 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973).

Appellants concede, as they must, "that by enacting the Robinson-Patman Act Congress [did not intend] to occupy the field to the exclusion of all state regulation of price discrimination." (Brief for appellants Exxon Corp., *et al.* at 55). The first of the three steps applied in *DeCanas* is thus of no help to appellants. The third step is similarly of no assistance to appellants in *this* argument because the ground upon which the argument is based is "independent" of a claim of actual or potential conflict. (Brief for appellants Exxon Corp., *et al.* at 79).

Consequently, the only question left is whether the field (price discrimination) is one requiring exclusive federal regulation. Not surprisingly, the only cases cited by appellants in support of this argument fall within that exclusive category. Those two cases, *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225 (1964), and *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), involved federal patent law and national labor law, respectively. It seems absolutely clear to appellees that the regulation of price discrimination does not represent so pervasive a federal interest as to require the exclusion of the states. It would seem that appellants share this view because, in their words, "the federal Robinson-Patman Act and the State's similar act reflect the *legitimate regulation of improper price discounts. . . .*" (Brief for appellants Exxon Corp., *et al.* at 97) (emphasis added).

Part of the "independent ground" upon which appellants urge federal preemption of Paragraph D is that it "severely disrupts the *delicate balance* struck by Congress between the purposes of the Robinson-Patman Act and the Sherman Act." *Id.* at 80 (emphasis added). That contention contains no small amount of irony.

Appellees recognize the delicacy of that balance. They view Section 2(b) of the Robinson-Patman Act as the statutory interface by which the two acts and their underlying philosophies are accommodated and united. They see appellants' contention as ironic because the judicial expansion of Section 2(b) so as to accommodate the marketing of gasoline (or any other product) through exclusive dealing agreements would shatter the balance so delicately struck between the intrabrand price rigidity promoted by the Robinson-Patman Act and the interbrand price flexibility favored by the Sherman Act.

One special accommodation which must be made if Section 2(b) is not given the strict construction urged by appellees pertains to the manner in which oil companies attempt to satisfy that defense's "good faith" requirement. In fact, the loose construction of Section 2(b) sought by appellants, combined with their unusual problems in verifying the "good faith" of their granting of voluntary allowances, would constitute a serious threat to the statute the proviso was enacted to accommodate — the Sherman Act.

E. THE ULTIMATE DETERMINATION OF THOSE CIRCUMSTANCES, IF ANY, UNDER WHICH SELLERS MAY HORIZONTALLY ENGAGE IN PRICE DISCUSSIONS IN ORDER TO SATISFY THE "GOOD FAITH" REQUIREMENT OF SECTION 2(b) SHOULD BE MADE UNENCUMBERED BY ANY PROBLEMS PECULIAR TO EXCLUSIVE DEALING.

Any seller who would rely on the Section 2(b) defense must show that he has acted in good faith. To a great extent, a seller's good faith is measured by the care he takes to determine the accuracy of the information he has received concerning the lower price he wants to meet. *See, In re Forster Mfg. Co., supra.* As appellants have noted (Brief for appellants Exxon Corp., *et al.* at 88), this Court has determined that it will review the validity of a claim which asserts that horizontal price discussions between competitors do not violate Section 1 of the Sherman Act if they are conducted for the purpose of verifying the "equally low price of a competitor" and not for the purpose of fixing prices. *United States v. United States Gypsum Co.*, 550 F.2d 115 (3d Cir. 1977), *cert. granted*, ___ U.S. ___, 46 U.S.L.W. 3182 (U.S. Oct. 3, 1977). If appellees are correct in their contention that no conflict exists between the Robinson-Patman Act and Paragraph D of the Maryland Act because the court below properly construed Section 2(b), then this Court will not need to consider when it hears *U.S. Gypsum* the virtual impossibility of suppliers who market through exclusive dealing agreements to verify prices in a traditional, pro-competitive manner. If, on the other hand, appellants' construction of Section 2(b) is determined by this Court to be correct and, as a consequence, sellers who share no customers must have some means by which to satisfy the "good faith" requirement of that defense, then the problems encountered in giving full effect to both the Robinson-

Patman Act and the Sherman Act become far more complex. Because the rule which will result from this Court's decision in *U.S. Gypsum* presumably will apply equally to all suppliers entitled to the Section 2(b) defense,[25] a brief examination of the means of price verification available to suppliers who share customers, but unavailable to suppliers who do not, seems appropriate.

The traditional and only truly reliable means of price verification is the examination of an invoice or a written quotation possessed by a customer who claims to have purchased at or to have been offered a lower price. The customer who has actually purchased at a lower price will have an invoice to prove it. The customer who has only received an offer of a lower price may produce a written quotation or, in its absence, prepare a written statement containing the necessary information.[26] Such an invoice, written quotation, or prepared statement, presented to the appropriate personnel of the supplier desiring to meet the lower price[27] should always constitute sufficient verification. The veracity of the only document which might be suspect, the statement prepared by the customer, would be supported by the threat of prosecution of the customer himself under Section 2(f) of the Robinson-Patman Act for knowingly inducing or receiving an illegal discrimination in price. *See, Beatrice Foods Co.*, 76 F.T.C. 719 (1969), *aff'd sub nom., Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971); Note, *Meeting Competition Under the Robinson-Patman Act*, 90 Harv. L. Rev. 1476, 1496 (1977).

[25] *FTC v. Sun Oil Co.*, 371 U.S. at 524-25.

[26] Such a statement could also spell out the details of any rebate, discount, or other condition preferential to the customer but not appearing on either the invoice or a written quotation.

[27] *See, generally, Viviano Macaroni Co. v. FTC*, 411 F.2d 255, 258-59 (3d. Cir. 1969).

Moreover, the refusal by a customer claiming a lower price to produce any documentation should put the supplier to whom the request is made on notice that the lower price is probably fictitious. In any event, discussions with a person other than the customer for purposes of price verification never need be resorted to if the customer is common to the two suppliers in question.

Documentary verification at the customer level between the parties to exclusive dealing agreements of the sort engaged in by oil companies is, of course, not possible. The branded gasoline dealer has no written quotation or invoice to produce because he has not received an offer of a lower price on some other brand and, by the terms of his "products agreement" (or equipment lease agreement), would be prohibited from purchasing at the lower price (or any other price) had he received one. With regard to the preparation of a statement, he is no less in the dark than is his supplier concerning the actual existence of a lower price offered to some other dealer selling a different brand of gasoline. Moreover, it seems inconceivable that a branded gasoline dealer could be prosecuted successfully for violating Section 2(f) of the Robinson-Patman Act; the knowledge which he possesses concerning some phantom lower price offered by some other supplier to its dealer would be wholly insufficient to deceive the verifying supplier.

Thus, the exclusive supplier must seek verification from some person other than its captive customer who desires to obtain the speculative lower price. In order to avoid Sherman Act liability of the type affirmed by this Court in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), or, worse, criminal liability, the prudent exclusive dealer would first seek verification from its competing supplier's captive customer. Common sense, logic, and the most modest presumption of

business sense attributable to that captive customer lead, however, to the absolutely inescapable conclusion that any such verification request would be met with the response that the price in question is none of the inquiring party's business. To reply otherwise, at least if the reply were to be truthful, would be to negate the competitive advantage speculatively enjoyed by the party asked. Businessmen (and branded gasoline dealers are no less businessmen because they are captive) simply cannot be presumed willingly to act to their clear economic detriment, and it is against their economic interest to have a competing gasoline dealer receive an equally low price.

Not surprisingly, the same may be said of suppliers. A well understood and fundamental rule of business which seems to underlie this Court's holding in *Container*, may be postulated as follows:

> One competitor does not provide to another competitor confidential price information absent an agreement, tacit or explicit, that the information so provided will not be used by the recipient to the competitive disadvantage of the provider.

Thus, in response to the incipiency of a price war such as that hypothesized by the court in *Belliston v. Texaco, Inc.*, 455 F.2d 175, 182 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), Texaco might be expected to request confidential price information from its competing supplier. Texaco's competitor, however, would be expected *not* to answer, at least not truthfully. There are several reasons for this latter expectation. First, the instigator of a price war wants the additional volume which such an aggressive price policy is designed to get. Were he to confide his new price structure to his competitors, his lower price would result in lower profits at the same volume rather than higher profits due to increased volume.

Second, the instigator of a price war wants to keep his newly won customers. Consequently, it is in his best interest to

> compel . . . [his competitor requesting verification] to choose . . . between ruinously cutting its prices to all its customers to match the prices offered to one [albeit in exclusive dealing offered to none], or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs. *Standard Oil Co. v. FTC*, 340 U.S. at 250.

This ruinous choice would be the goal of the price war instigator because a "seller told it must cut prices to all or to none might well choose the latter course." R. Kuenzel & H. Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1235 (1976).

Third, if the competitor requesting price verification is refused, and verification is otherwise unavailable, any resultant price reduction on a limited basis would subject that competitor, in the absence of "feathering," to the Section 2(a) secondary-line liability he purportedly is attempting to avoid. Moreover, if we are to accept *arguendo* the correctness of appellants' contention that primary-line Section 2(a) liability may flow from one competitor to another although they neither share nor attempt to share a customer, (Brief of appellants Exxon Corp., *et al.* at 78 n. 41), the person refusing the request for verification would be expected to anticipate a treble damage action against his requesting competitor should the price inadvertently be beaten rather than merely met.

Thus, to the extent that businessmen consider the legal implications of verification requests and weigh those implications in terms of competitive price advantage, the prudent competitor would keep quiet. In fact, if the possibility of stupidity is ruled out, the only reasons

why a competitor might respond would be based upon intimidation or anticompetitive intent. The isolation of a non-shared customer from these motivations against apparent, legitimate self-interest is the factor which necessarily causes exclusive dealers to embrace horizontal verification and reject vertical verification. A supplier marketing through exclusive dealing agreements who is told that any verification in which he engages must not be horizontal has been told in effect that the Section 2(b) defense is unavailable to him.

It thus becomes apparent that if Paragraph D of the Maryland Act falls because a "voluntary allowance," as defined by the court below, is held to qualify for the Section 2(b) defense, and if price verification is to be a continued requirement of that defense, then the imprimatur of this Court of necessity will appear on some form of horizontal price verification. Even if the question of appellants' entitlement to the Section 2(b) defense were close, and it is not, the price verification problems posed by granting that entitlement would constitute sufficient reason to deny it. Besides creating a wholly unjustified antitrust exemption for those who market exclusively through captive customers and fostering the proliferation of that practice in other industries, such a rule would tear the fabric of both the Robinson-Patman Act and the Sherman Act. Intrabrand wholesale price rigidity, viewed by those who enacted the Robinson-Patman Act as desirable because it stimulates interbrand wholesale price competition and places purchasers from a common supplier on an equal footing, is softened substantially if "voluntary allowances" qualify for the Section 2(b) proviso. Interbrand competition, the primary objective of Section 1 of the Sherman Act, is virtually destroyed as between oil companies if "voluntary allowances" must be verified horizontally. Moreover, the expanded scope given the Sherman Act and the Robinson-Patman Act by this Court in *Container* and *Sun Oil*, respectively,

and the philosophy, expressed by this Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, ___U.S.___, 97 S. Ct. 2549 (1977), of tolerating some intrabrand restraint in order to stimulate interbrand competition, largely would be negated. The objective, expressed by this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick*, of simplifying the trial of price fixing cases by introducing elements of predictability, would be damaged severely if speculation regarding the "good faith" element of horizontal price discussions were to become a standard element of defense.

The better route would be for this Court to have its examination of the anticompetitive effects of horizontal price verification unencumbered by any special accommodation implicitly granted here for exclusive dealing agreements in general or the oil industry in particular. By declining to expand Section 2(b) in the manner urged by appellants, this Court may well prevent the conversion of that defense into a Trojan horse which, ironically, would frustrate the philosophies of the two federal antitrust statutes it was enacted to unite. If Paragraph D were to be struck down as constituting an obstacle not to the fulfillment of those philosophies, but rather to their frustration, the irony would be complete.

IV.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE COMMERCE CLAUSE.

The federal government's power to regulate commerce, derived from the Commerce Clause, "does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 140 (1973); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-67 (1945); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). Paragraph D of the Maryland Act does not directly or indirectly create a burden on

interstate commerce. Paragraph D regulates sales which take place *wholly within the borders of Maryland*. As such, it is clearly distinguishable from state statutes stricken by this Court which attempted to regulate the price to be paid for goods or merchandise *purchased in a different state*. *See, Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935)[28]. There is no constitutional infirmity in a state statute which regulates purely intrastate sales which by their very nature are essentially local in character. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). No different result is mandated simply because the product sold *within the state and whose selling price is there regulated* originates outside of the state where its price is regulated. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974); *Baxley v. Alabama Dairy Commission*, 360 F. Supp. 1159 (M.D. Ala. 1973). Nor does Paragraph D discriminate against interstate commerce or create any trade barrier; it applies equally to gasoline produced within or without Maryland. In short, Paragraph D neither directly nor indirectly regulates commerce beyond its borders. The nondiscriminatory uniform pricing policy reflected in Paragraph D does not, by any rationale, constitute a "serious impediment to the free flow of commerce." *Southern Pacific Co. v. Arizona*, 325 U.S. at 775.

Finally, the "ripple effect" on price which appellants contend would occur at Maryland's borders is illusory. (Brief for appellants Exxon Corp., *et al.* at 96). As they virtually concede, "feathering" would prevent the occurrence of any Robinson-Patman secondary-line

[28] In *Baldwin*, a New York milk control statute was found to be an unreasonable burden on commerce because it sought to fix the minimum price at which New Yorkers could purchase milk in another state. The statute declared that if the New York minimum price was not paid on milk purchased in another state, then the milk so purchased could not be offered for resale in New York.

competitive injury to their respective dealer customers who purchase at different prices on different sides of the state line. (*Id.* at 78 n.41). Any extra-territorial effect of Paragraph D is at best avoidable and at worst *de minimis*. In either event, Paragraph D does not unduly burden interstate commerce.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Maryland should be affirmed, and the Maryland Act upheld as constitutional.

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Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

REPLY OF APPELLANTS

Appellants Exxon Corporation ("Exxon"), Phillips Petroleum Company ("Phillips"), Shell Oil Company ("Shell") and Gulf Oil Corporation ("Gulf") (hereafter collectively referred to as "appellants") respectfully submit this Reply.

ARGUMENT

I. PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT DISCRIMINATE AGAINST AND IMPOSE AN UNDUE BURDEN ON INTERSTATE COMMERCE

Appellees leave largely unchallenged, as they must, the conclusion that Paragraphs (B) and (C) of the Act impose a burden on interstate commerce. They seek to justify this burden by asserting that the Act protects an important local interest, *i.e.*, competition in the retail sale of petroleum products in Maryland (Brief of Appellees at 22), while the facts in the record establish the contrary.

Appellees seem to argue that because states have power to prevent destructive competition, state laws having such an objective cannot unreasonably burden or discriminate against interstate commerce. But the fact that states have general power to enact antitrust legislation, or for that matter laws designed to protect the public health (*Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951)), does not mean that all laws with such objectives are necessarily valid no matter what their effect on commerce. Where as here the practical effect is to force many interstate competitors out of the state and to exclude new entrants, and the actual and intended effect is to limit the market to local merchants, the general principles requiring a balancing of the burden on commerce against the local benefits and the availability of nondiscriminatory alternatives still apply. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[1]

[1] The Brief of *amici* Day Enterprises, *et al.*, at 41-43, suggests the contrary.

A. The Act, By Forcing Existing Competitors Out of the Maryland Market and Effectively Precluding New Ones From Entering, Reduces Interbrand Competition.

The record before this Court established that the principal effect of the Act will be to reduce significantly the opportunities for interbrand competition in Maryland by forcing the vast majority of private brand low price marketers out of the Maryland market and by preventing refiner-marketers not already in the Maryland market from ever entering that market. The uncontradicted evidence in the record established that Ashland Oil, Petroleum Marketing Corporation, Kayo Oil Company and Hudson Oil Company, which operate in Maryland exclusively with company-operated stations, would be eliminated as competitors in the Maryland market if the Act is upheld. *See* Brief of Appellants at 14. The evidence further established that these companies sell their gasoline at prices one to four cents per gallon lower than those of the major brand dealers. (A. 356, 451-52, 507, 517).

The overall effect of the Act, in eliminating existing private brand low price marketers and impeding the entry of others, will be, as the trial court found, to reduce significantly the number of competing brands and thereby reduce interbrand competition at the retail level. (J.A. 130a).[2] In addition, the elimination of the majority of the price marketer-type stations from the Maryland market will have an adverse effect on the price paid by consumers for gasoline purchased in Maryland. (A. 368-71, 427-29). Ironically, it is "intertype" competition—a form of interbrand competition between major brand stations on the one hand, and private brand stations on the other

[2] This Court recently said in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S.Ct. 2549, 2559 n.19 (1977), that "[i]nterbrand competition . . . is the primary concern of antitrust law."

hand—which appellees' expert witness said the Act was designed to promote. (A. 588-89). As conclusively demonstrated by the record in this case, and as found by the trial court, in fact the Act will have the opposite effect.

An *amicus* brief (Day Enterprises, *et al.*, at 40) asserts that the Act is designed to promote intrabrand as well as interbrand competition. But prohibiting private brand refiner-marketers from using the method of marketing which is most conducive to lower prices can hardly be said to benefit competition, intrabrand or interbrand. The statement that intrabrand competition would be frustrated if companies such as appellants Kayo and PMC were permitted to continue to do all of their selling through company-operated stations is, on its face, absurd.[3] Eliminating them from the market would merely reduce the number of low price competitors for the other brands.

Moreover, with 94 percent of Maryland's approximately 3800 stations operated by independent dealers or jobbers (A. 190-91), and with no major company (except BP) operating or contemplating the operation of more than about 10 percent of its service station outlets, the consumer clearly has the benefit of substantial intrabrand competition.[4]

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[3] The brief of *amici* Day Enterprises, *et al.*, in the same breath in which Kayo and PMC are mentioned, also refers to BP Oil which had converted 42 of its stations to company operations between 1973 and 1974 after losing $150,000,000 in its marketing operations during the preceding years. *See* Brief of Appellants at 51 n.25. BP, however, contrary to the "statement of facts" by *amici* (at 9), was still marketing predominantly through dealer operated stations, six under the name BP and 112 under the name of William Penn. (A. 190-91).

[4] In 1975 Phillips had 13 [now reduced to six] out of 121 stations, or 10.7 percent. (A. 234). Gulf anticipated operating ten percent of its 219 stations in five years as full self-service outlets. (A. 226). As of July 1, 1974, Exxon operated 36 out of 632 of its branded stations, or less than six percent, which represents a decline from 57, or over nine percent, company operated in 1971. (A. 190, 196). Shell operated one of its 284 stations as of July 1, 1974, but no longer does so. (A. 191). Apart from BP (as noted, *supra*), the percentage of stations in Maryland operated by the other major companies ranged from zero to three percent. (A. 190-91).

B. The Act Interferes With the Operations of Major Oil Companies.

Appellants recognize that the most significant impact of Paragraphs (B) and (C) of the Act is on small independent or partially integrated refiners rather than on the major fully integrated oil companies because the latter rely and will continue to rely predominantly on independent dealers. Nevertheless, appellants reiterate that company-operated stations are an important part of their marketing operations, both in Maryland and elsewhere. As discussed in Appellants' Brief,[5] company-operated stations can be essential in entering new markets and enhancing interbrand competition. And this Court has recognized the importance to the competitive process of permitting flexibility in marketing practices under precisely those circumstances. *See Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S. Ct. 2549, 2560-61 (1977). In addition, appellants operate a limited number of their stations with company employees rather than through independent dealers in order to participate in the growing gasoline-only, self-service, and private brand markets in which gasoline generally is sold at lower prices and which are a beneficial result of the competitive process.[6]

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[5] Brief of Appellants at 12-13.

[6] The National Congress of Petroleum Retailers in its *amicus* brief (at 8) states that nothing in the Act prohibits a producer or refiner from converting a full service station to a gasoline-only outlet. It should be noted that in 1977 the Maryland General Assembly, at the urging of dealers associations, such as the National Congress of Petroleum Retailers, enacted Chapter 870, Laws of Md. 1977, establishing a two-year moratorium on the conversion of conventional stations to gasoline-only stations. It is presently being challenged in court. *Sun Oil Company* v. *Goldstein*, Civ. No. N77-1960 (D. Md.,

C. Independent Dealers Dominate and Will Continue to Dominate the Sale of Petroleum Products in Maryland Whether or Not the Act Is Upheld.

Amici suggest that the Act is necessary to prevent 15 or 20 oil companies from controlling retail prices in Maryland.[7] But this assumes that the major integrated companies will take over and operate most, all, or a substantial proportion of the service stations in Maryland. Such control certainly cannot be achieved through the roughly 200 stations which the record shows were operated by producers and refiners (major and independent) out of approximately 3800 total stations in 1974. (A. 189-191). To require divestiture of this small number of stations which are presently company operated is clearly a case of legislative overkill. Unless one assumes the very doubtful proposition that 15 or 20 strong competitors do not provide an adequately competitive market, any basis for the alleged benefit to be derived from divestiture vanishes.[8]

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filed Nov. 22, 1977). Professor James M. Patterson, appellees' expert in the present litigation, has filed an affidavit in the *Sun Oil* litigation in support of Sun Oil's position that the moratorium law imposes an unconstitutional burden on interstate commerce, stating that it runs counter to "consumer judgments expressed through the market," it "restrains the development of gasoline retailers who emphasize prices as their principal purchase proposition," and it "weakens both interbrand and intrabrand price competition."

[7] Brief of *amici* Day Enterprises, *et al.*, at 34.

[8] This point is significant in view of the reference by *amici* Day Enterprises, *et al.*, at 19 of their Brief, to Professor Berry (expert witness for Gulf at trial) as having conceded that "vertical integration can be a barrier to entry by requiring the new entrant to the business to enter at two levels, both marketing and refining." The reference is highly misleading and typical of the liberties concerning the record taken by *amici* in their brief, for the vertical integration of which Professor Berry spoke was an extreme and completely hypothetical case in which a pure monopolist producer merges with a sole monopolist buyer. (A. 439-40). Obviously, that has no application to the petroleum industry in Maryland or anywhere else.

[Footnote continued on page 7]

Nor does the record provide any support for the misleading inference that the major companies in general, or Exxon and Gulf in particular (Brief of *amici* Day Enterprises, *et al.*, at 9-10), will follow BP (which had acquired a weak chain of stations from Sinclair and had lost vast sums, A. 768-770) in shifting markedly to company operated stations. As indicated, Gulf intends to maintain dealers for 90 percent of its stations. Exxon operates 94 percent of its stations through dealers, and its witness testified that it would continue to rely substantially on dealers: "In the thirteen years that I've been with the company we've always operated the predominant number of our stores on a dealer operated basis and we have no plans to change that position. We feel that dealers are the backbone of our business." (A. 315).

Both the purpose and the effect of the Act are, as noted in the appellees' original answers to the bills of complaint (A. 29, 51, 77, 104, 128, 145), to promote the economic welfare of the independent major brand dealers. Not one shred of evidence was produced by the appellees, however, in support of the proposition that promoting the welfare of independent major brand dealers at the expense of competition by price marketers improves the competitive process.[9] The absence of *any* such evidence casts grave doubt upon the *bona fides* of such asserted

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[8] [Continued]

And Professor Berry made this perfectly clear in explaining his reasons for concluding that the Maryland Act was anticompetitive. (A. 429-33).

[9] The only evidence the appellees produced related to the possible growth in competitive position of the independent private brand marketers as producers and refiners are eliminated from the market. It is not surprising to suppose that those entities not precluded from operating will benefit from elimination of their competitors. This, of course, does not mean that competition in the retail market has been improved. The record makes it clear that, in fact, such competition will be impeded.

local interest in maintaining or improving the admittedly "highly competitive" retail market in Maryland. (Brief of Appellees at 7).

Accordingly, neither the divestiture of the existing company operated stations nor the prohibition against operating other such stations serves the legitimate local purpose proclaimed by appellees which is to be balanced against the impairment of interstate commerce. The alleged potential danger to "intertype" competition perceived by appellees' expert cannot justify the elimination of the majority of all private brand marketers with the consequent reduction in interbrand competition.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 341 U.S. 329 (1951), which is relied upon by appellees and their *amici*, differs from the present case in two significant respects. First, as the Court notes, the case did not involve an absolute prohibition on business activity as does the present case. The Court simply upheld the right of the Michigan Public Service Commission to require a natural gas company to obtain a certificate of public convenience and necessity prior to selling directly to industrial consumers. *Id.* at 336. The industrial consumer Panhandle sought to serve was already being served by a public utility and a duplication of existing pipelines would have been required. Thus, the Court suggested, whether the costly duplication of lines and the loss of customers to the public utility would be in the public interest would be a matter for determination by the Commission if and when Panhandle applied for a certificate. *Id.* at 334. That is the traditional function performed by a regulatory commission in the public utility field and has no application to the present litigation. The local interest in regulating the operation of a public utility was far more compelling than Maryland's purported interest here, and the action taken to protect that interest was far less drastic than the action taken by Maryland.

A second important fact which distinguishes *Panhandle* from the present case is that the natural gas industry, with a limited number of competitors at the retail level, traditionally has been considered to be a public utility subject to extensive state regulation. *See Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 522 (1947). This is in marked contrast to the petroleum industry, where there is a large number of competitors, particularly at the retail level, and the consumer has a wide range of choices readily available. (J.A. 99a; A. 429, 432).

D. Direct Operation of a Retail Station Does Not Equate With Price Fixing.

The *amicus* briefs contend that producers and refiners operate retail stations so that they may legally fix the prices of petroleum products and thereby circumvent the antitrust laws. The record demonstrates that unbranded or privately branded products can be sold only at prices lower than major brand products, and that this cannot be accomplished through reliance upon the voluntary conduct of independent dealers. *See* Brief of Appellants at 11-12, 33-34. Efforts to force dealers to adhere to such prices would, and did, violate the antitrust laws, as the *amici* proclaim. The consequence was that only by operating stations themselves could private brands compete with other low price stations. To argue, as *amici* do, that such an effort to meet the public demand for lower prices is motivated by a desire to control the price structure in a manner contrary to antitrust policy, if not present law, is a gross distortion of what the record shows without contradiction. Moreover, the implication that any antitrust policy is impaired by permitting an entity engaged in a retail business to control the prices of the product *it* sells is to turn the antitrust laws on their head.

E. There Is No Evidence of Anticompetitive Use of Company Operated Stations Which Would Justify Their Elimination.

To justify the burdensome effects of the Act, appellees and their *amici* place heavy reliance on claims of anticompetitive practices allegedly associated with company operated stations. Notwithstanding a full trial on the issues, they are unable to point to any specific evidence in the record (apart from a generalized prediction by one witness[10] as to what might occur in the future) to support claims that alleged "windfall profits" derived by companies through production operations have been employed to engage in predatory retail pricing, that such "windfall profits" exist, or that company operated stations have been used to control the pricing practices of dealers. The most they can point to are claims of some instances of unfair allocation during the gasoline shortage of 1973, none of which involved any of the appellants. *See* Brief of Appellants at 49 n.23. But the matter of fair allocation is now subject to detailed regulation by the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* (Supp. 1975), as well as by Paragraph (F) of the Maryland Act.

In view of the record in this case, which shows that the use of company operated stations constitutes a significant pro-competitive force in the marketplace, the attempt of appellees and their *amici* to construct various extra-record theories as to how the Act protects the competitive process should not be given credence.

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[10] The witness was Professor James M. Patterson, as to whom, see note 6, *supra*.

F. The Act Has the Effect of Discriminating Against Interstate Commerce.

Appellees and their *amici* challenge appellants' discrimination argument by stating that the Act on its face (a) does not exclude businesses solely on the basis that they engage in the production or refining of petroleum products outside Maryland, and (b) leaves undisturbed businesses not affiliated with a producer or refiner, some of which are non-Maryland entities. These statements totally ignore the realities of the Maryland marketplace.

Even though it is possible that some business may one day construct a refinery in Maryland, the undisputed fact remains that at the time the Act was passed and continuing to this date, there is no production or refining of gasoline in the State of Maryland, and the only companies prohibited by the Act from operating stations in Maryland are those engaged in out-of-state production or refining. In any event, in establishing unlawful discrimination, it would be of little significance even if some companies did engage in refining in Maryland since the overwhelming burden of the statute would still fall on the interstate operations of non-Maryland businesses. *Cf. Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951).[11] *See also Brimmer* v. *Rebman*, 138 U.S. 78 (1891), and *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), discussed in Brief of Appellants at 28-30.

Appellants submit that it is no accident that the businesses adversely affected are almost exclusively out-of-

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[11] In contrast with *Dean Milk* and the present case, there was an obvious peculiarly local interest which this Court on balance found justified the discrimination imposed by the ordinance upheld in *Breard* v. *Alexandria*, 341 U.S. 622 (1951), a case relied upon by appellees. The local interest promoted by the ordinance banning uninvited door-to-door soliciting was the protection of residents from the nuisance of "uninvited intrusions into the privacy of their homes."

state entities. The Act was drafted so as to deprive out-of-state producers and refiners of the right to operate their stations in Maryland, and correlatively, to reserve that right to local independent dealers. The fact that there may be a few stations operated by interstate non-integrated marketers of gasoline (such as the three operated by Sears, Roebuck, A. 191) which could continue to be so operated under the Act is insignificant relative to the principal effect of the Act which is to require that producers and refiners hand over the operation of all their stations to independent dealers.

II. PARAGRAPH (D) OF THE MARYLAND ACT CONFLICTS WITH THE ROBINSON-PATMAN ACT

A. Appellees and the Maryland Court of Appeals Misconstrue the Scope and the Protections Afforded by Section 2(b) of the Robinson-Patman Act.

1. *The Maryland court's construction of Section 2 (b) is contrary to the purposes of Congress.*

Appellees assert that "federal antitrust policy" (Brief of Appellees at 41) and "the purposes and objectives" of Section 2(b) of the Robinson-Patman Act (*id.* at 44) indicate the Maryland court correctly held that Section 2(b) is available to a seller only where the seller is meeting a competing seller's equally low price offered to the same customer. The heart of appellees' position is that Paragraph (D) of the Maryland Act serves the Congressional purposes embodied in Section 2(b) by imposing "intrabrand price rigidity" so as to "stimulate interbrand price and product competition." (*Id.* at 41). This contention is erroneous.

In enacting the Robinson-Patman Act, Congress did not intend to impose intrabrand price rigidity. The express

terms of Section 2(a)[12] as well as the legislative history of the Robinson-Patman Act[13] establish that Congress recognized that price rigidity was undesirable and thus sought only to prohibit price differences which may cause substantial injury to competition. *See, e.g., FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960). Indeed, appellees concede that Congress intended that "intrabrand price restraint promoted by the Robinson-Patman Act should yield to the interbrand price freedom favored by the Sherman Act"[14] and that "to secure this interbrand preference Congress enacted Section 2(b) of the Robinson-Patman Act." (Brief of Appellees at 41). However, appellees fail to recognize that in contrast to the *increased* intrabrand price rigidity imposed by Paragraph (D), the right to meet local competition afforded by Section 2(b) promotes interbrand price competition by *lessening* intrabrand rigidity.

Appellants' practice of meeting a competing supplier's lower price by granting voluntary competitive allowances in equal amounts to all of their dealers in the same competitive trade area promotes interbrand price flexibility. Such voluntary allowances will not harm secondary-line

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[12] Section 2(a) prohibits price discrimination only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." (15 U.S.C. § 13(a) (1970)).

[13] *See* Brief of Appellants at 82-84.

[14] *See Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S.Ct. 2549, 2559 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law."); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of Law & Econ. 7, 11 (1966) ("the legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies."); *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 249 (1951) ("Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor.").

intrabrand competition since all dealers in a trade area affected by the competing supplier's lower price receive the same competitive allowance.[15] In contrast, Paragraph (D) and the Maryland court's interpretation of Section 2(b) impose a type of statewide intrabrand price rigidity which stifles interbrand competition among suppliers.[16] This statewide intrabrand price rigidity does not protect or enhance secondary-line competition since, for example, dealers in Baltimore do not compete with dealers in other parts of Maryland such as in Salisbury. Paragraph (D) and the Maryland court's construction of Section 2(b) thus result in a decrease in competition since primary-line interbrand price flexibility is sacrificed without increasing or protecting intrabrand secondary-line competition among dealers. Such a result is directly contrary to the purposes of Congress in enacting Section 2(b). *See* Brief of Appellants at 80-94; Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L. J. 935, 942 n.32 (1957). *See generally* Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich. L. Rev. 962, 974-78 (1977).[17]

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[15] To the extent necessary to avoid competitive injury, appellants "feather" the allowance to adjoining trade areas by granting allowances in decreasing amount as the distance from the initial trade area increases. (A. 674). This practice of feathering was suggested by this Court in *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 528 n.17 (1963), and substantially lessens the likelihood that granting voluntary allowances will result in competitive injury among dealers. *See, e.g., American Oil Co.* v. *FTC*, 325 F.2d 101, 103-05 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

[16] *See* Brief of Appellants at 81 nn.43, 44.

[17] Appellees' speculations concerning horizontal price verification (Br. of Appellees at 58-64) are inapposite to the threshold question of whether a supplier has the right under Section 2(b) to meet a competing supplier's lower price. Whether a "reasonable and prudent" supplier would find it necessary to obtain price verification from a competing supplier is not germane to the issues before this Court.

2. *Appellees mistakenly rely on* Sun Oil, Standard Oil, *and* Staley.

Appellees erroneously argue that construing Section 2(b) so as to encompass voluntary allowances granted by a supplier in response to a competing supplier's lower price would "resurrect" the "conduit theory" rejected by this Court in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963). (Brief of Appellees at 48). In *Sun Oil* this Court refused to construe Section 2(b) as permitting a supplier (Sun) to "meet" retail competition through the "conduit" of its dealers when the competition was faced solely by the dealers. The Court reasoned that to allow a supplier the Section 2(b) defense *where there was no price cut by a competing supplier* would discourage "the enterprising and resourceful retailer from seeking price reductions on his own." (371 U.S. at 523). It is apparent that a "conduit theory" has no application to situations where, as here, the supplier is facing wholesale price reductions by competitors operating at the same functional level. Indeed, if a "conduit theory" applied to such competition, it would not have been necessary for this Court specifically to reserve in *Sun Oil* the question presented here.

The purpose of Section 2(b) is to permit a seller the flexibility needed to meet its competition. *See* Brief of Appellants at 85-94. As the Federal Trade Commission has found, the reality of such competition among suppliers of petroleum products is "an undeniable fact." FTC, *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373 at 18,245 (1967). "[I]t is only by reducing its wholesale price that the supplier can respond defensively to another supplier's price cut." (*Id.*)

The basis for the Commission's finding is unassailable. As acknowledged by appellees and found by the Maryland trial court, retail petroleum marketing is "a highly com-

petitive industry." (J.A. 99a). A retail dealer which receives a price cut from its supplier can increase its volume by lowering its price so as to undersell retail dealers of competing brands. As such a dealer increases its volume, the supplier of that dealer enjoys increased sales and suppliers of competing brands lose sales as their dealers lose business.[18] As one commentator has stated, "[c]learly, a seller's need for a lower price in response to a decrease in his sales is the same whether the decrease occurs because his purchasers switch to a price cutting competitor or because they are unable to protect their share of the retail market from distributors of a rival product." Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L. J. 935, 939 (1957). *See also* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 254 (1962).

Appellees also mistakenly rely on *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951). In that case, Standard proved that the discriminatory price reductions granted to particular customers were necessary to meet the equally low prices offered to those customers by competing suppliers. (340 U.S. at 236, 238). In holding that Section 2(b) justified such discriminatory price reductions notwithstanding competitive injury among purchasers, this Court emphasized that by guaranteeing a seller the right to meet "competition at the seller's level" (340 U.S. at 251), Section 2(b) promoted competition which Congress "sought to protect." (340 U.S. at 249).

[18] Contrary to the assertion of appellees (Br. of Appellees at 51), dealers are not "captive customers", but are free to change suppliers. *See, e.g., Krieger* v. *Texaco Inc.*, 373 F. Supp. 108, 112 (W.D.N.Y. 1973). Similarly in error is appellees' assertion that appellants market through "exclusive dealing agreements." (Br. of Appellees at 57). No dealer of an appellant is in any way obligated to purchase gasoline solely from the appellant. Appellants do not object to dealers purchasing from multiple suppliers so long as such dealers do not attempt to "palm off" other brands of gasoline under the brand-name or trademark of an appellant.

Appellees assert, however, that "[t]here is no room for doubt that *Standard Oil* presumed that the existence of a 'shared customer' was a prerequisite to the invocation of Section 2(b)." (Brief of Appellees at 46). By placing such stress on this Court's references to the "shared customer" situation presented by the facts in *Standard Oil* (Brief of Appellees at 47), appellees fail to recognize that *Standard Oil* turned on the seller's need to meet competition at "the seller's level" (340 U.S. at 251)—not on whether the competition was for the same customer. Emphasis on competition at the seller's level is also the heart of this Court's decision in *Sun Oil*, where the Court reaffirmed *Standard Oil* (371 U.S. at 514), stating that as properly limited to instances where the seller is meeting competition at the seller's level, Section 2(b) "comports . . . not only with the objectives of the Robinson-Patman Act but with the general policy of preserving the benefits of competition." (371 U.S. at 522). Indeed, appellees ignore the fact that if *Standard Oil* had presumed that a "shared customer" was a requirement under Section 2(b), this Court could have relied on that ground alone in disposing of *Sun Oil* and not have expressly reserved the question now presented. *FTC* v. *Sun Oil Co.*, 371 U.S. at 529 n.19.

Appellees also mistakenly rely on *FTC* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), and its holding that Section 2(b) is available only in individual competitive situations. By particularizing the amount and geographic scope of the competitive allowance to the geographic area affected by the competing supplier's price reduction, appellants satisfy the Section 2(b) requirement that the price reduction be tailored to the individual competitive situation presented. *See Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 442 (5th Cir. 1966). Such an individualized response is precisely what Paragraph (D) prohibits.

B. Appellees' Construction of Section 2(a) of the Robinson-Patman Act Would Leave Primary-Line Competition Among Suppliers Unprotected.

Compliance with Paragraph (D) requires a supplier of petroleum products in Maryland to grant statewide allowances and thereby engage in price discrimination that may be injurious to both primary-line and secondary-line competition.[19] Appellees contend that *as a matter of law* suppliers which comply with Paragraph (D) could never be exposed to potential liability for injury to primary-line competition with their supplier-competitors because "the price which causes injury must have been offered to a customer shared or solicited by the two sellers." (Brief of Appellees at 52). It is not surprising that "appellees can cite no authority for this contention" (*id.*), since it conflicts with the fundamental principle that Section 2(a) prohibits price differences which in fact threaten to cause injury to competition regardless of how that injury is realized or on what level. *See, e.g., Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969).[20] As this Court stated in *Sun Oil*, Section 2(a) "comprehends a 'difference in price' among even non-competing purchasers, the legality or illegality of which depends upon whether or not there is likely to be substantial injury to competition among sellers." (371 U.S. at 527 n.16, *citing FTC* v. *Anheuser-Busch, Inc.*). *See also Gas-A-Car, Inc.* v. *American Petrofina, Inc.*, 484 F.2d 1102, 1106-07 (10th Cir. 1973).[21]

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[19] *See* Brief of Appellants at 71-79.

[20] *See* Brief of Appellants at 71-73.

[21] Appellees argue further that it would be "highly unlikely that a supplier could ever establish the fact of primary-line injury" (Br. of Appellees at 54) because the "true per gallon price" of gasoline charged to a dealer would have to include the fluctuating rent charged to a dealer. This contention is erroneous since the wholesale price charged to dealers does not include "rent". (A. 678-80). *See also Shell Oil Co.* v. *FEA*, 400 F. Supp. 964, 969-70 (S.D. Tex. 1975), *aff'd.*, 527 F.2d 1243 (T.E.C.A. 1975); *Atlantic Richfield Co.* v. *Zarb*, 532 F.2d 1363 (T.E.C.A. 1976).

C. Paragraph (D) Is In Conflict With The Federal Act Because It Nullifies A Federal Right and Disrupts A Statutory Balance Created by Congress.

Appellees assert that "appellants argue for preemption albeit they do not use that word." (Brief of Appellees at 55). This contention is based on appellants' statement that Paragraph (D) "must be struck down on the independent ground that it nullifies the accomplishment and execution of the full purposes of Congress in enacting Sections 2(a) and 2(b) of the Robinson-Patman Act." (Brief of Appellants at 79-80; Brief of Appellees at 55). Appellees misapprehend both the nature of the conflict between Paragraph (D) and the Robinson-Patman Act and appellants' argument.

Contrary to appellees' assertion, appellants do not argue that in enacting the Robinson-Patman Act Congress intended to preempt all state legislation on the subject of price discrimination or that price discrimination is a field requiring exclusive federal regulation. Rather, it is appellants' contention that Paragraph (D) must be struck down under the Supremacy Clause because it is in direct, actual, irreconcilable conflict wih the Robinson-Patman Act.[22]

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[22] As explained by this Court in *De Canas* v. *Bica*, 424 U.S. 351, 359 n.7 (1976), a case of preemption is presented where Congress has decided to exercise its power to "occupy the field" and thereby "exclude *any* state regulation, even if harmonious". (Emphasis the Court's). "[E]ven absent such a manifestation of Congressional intent to 'occupy the field'", a state statute is void under the Supremacy Clause if it "conflicts in any manner with any federal laws or treaties." (*Id.* at 357 n.5).

Appellees' misapprehension of the question presented apparently is shared by the *amici* Day Enterprises, *et al.*, which, like appellees, rely on *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973), and other preemption cases in arguing that preemption is not appropriate absent a "clear manifestation" of Congressional intent. (Br. of *amici* Day Enterprises, *et al.*, at 24; Br. of Appellees at 56). Appellees and *amici* fail to realize that these cases are inapposite since the question presented (Br. of Appellants at 5) is

Appellees fail to recognize that a conflict between state and federal statutes may be found in two ways—both of which exist here. First, this Court has held that a conflict "is inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963). Paragraph (D) conflicts with federal law in this manner since compliance with Paragraph (D) exposes a supplier to primary-line and secondary-line liability under Section 2(a) of the Robinson-Patman Act.[23]

Second, even if compliance with both statutes is possible, a state statute is in conflict with a federal statute

whether Paragraph (D) is in *conflict* with the Robinson-Patman Act—not whether Congress intended to preempt all state legislation in the area of price discrimination. *See De Canas* v. *Bica*, 424 U.S. at 363.

[23] Relying on the Wisconsin Supreme Court's decision in *Wisconsin* v. *Texaco Inc.*, 1961 CCH Trade Cas. ¶ 70,153 (Wisc. S.Ct. 1961), *amici* Day Enterprises, *et al.*, argue at length that the Robinson-Patman issue "is wholly unripe for decision." (Br. of *amici* Day Enterprises, *et al.*, at 26). This argument is not shared by appellees and is contradicted by the substantial factual record developed below.

Amici's reliance on *Wisconsin* v. *Texaco Inc.* is misplaced. In that case Wisconsin brought suit alleging that Texaco had violated state antidiscrimination laws in granting "Dealers Aid Allowances". (1961 CCH Trade Cas. ¶ 70,153 at 78,588). Texaco *demurred* to the complaint on the ground, *inter alia*, that the Wisconsin statute was in conflict with the Robinson-Patman Act. The Wisconsin Supreme Court affirmed the trial court's denial of the demurrer, ruling that the conflict between the state statute and the federal statute could not be decided on the pleadings alone. In contrast, in this case the trial court had before it numerous undisputed affidavits and exhibits setting forth all relevant facts concerning the operation of Paragraph (D) and appellants' practice of granting voluntary competitive allowances. Further, unlike the state statute involved in *Wisconsin* v. *Texaco Inc.*, Paragraph (D) has been definitively construed by the highest state court. Accordingly, the question of conflict presented here is but a problem of "comparing two statutes" *Swift & Co.* v. *Wickham*, 382 U.S. 111, 120 (1965), on the basis of the facts supplied in the record.

and must be struck down where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the federal statute. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977). Paragraph (D) obstructs the purposes of Congress by nullifying a seller's right of self-defense to meet local competition. *See* Brief of Appellants at 88-94. This denial of a federal right and the consequent interference with a federal policy is in itself sufficient to invalidate Paragraph (D). *See, e.g., Perez* v. *Campbell*, 402 U.S. 637, 649-52 (1971); *Free* v. *Bland*, 369 U.S. 663, 669-70 (1962).

Paragraph (D) also interferes with Congress' purposes and objectives by disrupting the delicate balance struck by Congress between the Robinson-Patman Act and the Sherman Act. In enacting the Robinson-Patman Act, Congress intended to promote the Sherman Act objective of price competition by prohibiting only those price differences which may substantially lessen competition and by providing sellers with the absolute right under Section 2(b) to meet a local competitor's equally low price. *See* Brief of Appellants at 80-88. Paragraph (D) interferes with this statutory balance and thus conflicts with the Robinson-Patman Act by prohibiting price differences without regard to competitive effect and by eliminating the Section 2(b) defense. (*Id.*). Paragraph (D) must therefore be struck down under the Supremacy Clause. *See Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635-37 (1975); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 230-33 (1964).

CONCLUSION

For the foregoing reasons and for the reasons stated in appellants' Brief, Paragraphs (B), (C) and (D) of the Maryland Act should be declared invalid.

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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 77-10, 77-11, 77-12,
77-47, and 77-84

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
CONTINENTAL OIL COMPANY and KAYO OIL COMPANY,
GULF OIL CORPORATION,
ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., and PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

REPLY OF APPELLANTS ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., and PETROLEUM MARKETING CORPORATION

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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 77-10, 77-11, 77-12, 77-47, and 77-64

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY and KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., and PETROLEUM MARKETING CORPORATION,

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

REPLY OF APPELLANTS ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., and PETROLEUM MARKETING CORPORATION

This Reply is submitted by Appellants Ashland Oil, Inc. ("Ashland"), Commonwealth Oil Refining Company, Inc. ("Commonwealth") and Petroleum Marketing Corporation ("PMC"). Ashland and Commonwealth-PMC have appealed only that portion of the decision below which held that Paragraphs B and C of the Maryland Act did not violate the Commerce Clause. The argument in this Reply, therefore, is limited to that subject.

The basic standards to be applied in determining whether state legislation violates the Commerce Clause are not in dispute. The parties agree that the general rule is stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. [citation omitted]

The question before the Court, as always, is whether the particular statute at issue meets this test.

The Maryland Act prohibits refiners from operating retail service stations with company personnel, and expressly provides that all such stations "must be operated by a retail service station dealer." The State contends this prohibition is an even-handed regulation that does not discriminate against interstate sellers in the Maryland market. It also says the Act is needed to preserve competition in the local retail gasoline industry, and asserts that this need outweighs any incidental burden on interstate commerce which may result from the statute's enforcement. These contentions cannot be squared with the record evidence. *Raymond Motor Transportation, Inc. v. Rice*, No. 76-558, slip op. at 15, 18 (Feb. 21, 1978).

1. THE MARYLAND ACT IMPOSES A SUBSTANTIAL BURDEN ON INTERSTATE COMMERCE

The State claims the Act does not unconstitutionally burden interstate commerce because "[i]nterference with the flow of gasoline across state lines, if any, is *de minimis* and permissible as an incident to the regulation of the retailing of gasoline." Appellees' Brief, p. 32. This erroneously assumes that no regulation of interstate business can violate the Commerce Clause unless it effectively reduces the total flow of goods coming into the State.

This Court has repeatedly made clear that interstate commerce may be burdened by means more subtle than direct restrictions on imports. Any state regulation having the practical effect of increasing operating costs, hampering efficiency, or otherwise reducing the competitive strength of interstate businesses can constitute a burden on commerce. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, ____ U.S. ____, 97 S.Ct. 2434, 2445 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373-75 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. at 143-46; *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 781-82 (1945). The fundamental question thus is not whether the total volume of goods moving in interstate commerce would be reduced, but rather whether the state has interfered "with the natural functioning of the interstate market *either* through prohibition *or through burdensome regulation.*" *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (emphasis added).

The Maryland market is a small part of a much larger geographical market that is supplied by a number of refiners using various distribution methods.[1] Some — the major oil companies — market primarily through a dealer-

[1] The basic facts are not in dispute. See generally, Brief of Appellants Ashland Oil, Inc., *et al.* (hereinafter "Appellants' Brief"), pp. 7-12.

distribution system which uses service and brand recognition as its principal competitive tools. Others — the independent refiners — lack the resources for this type of marketing program and instead have chosen to rely upon company-operated "gas and go" outlets which sell private brand gasoline at discount prices.[2] The Maryland Act compels refiners that operate private brand stations either to install dealers at those locations or to abandon them. The State suggests that the drastic restructuring of distribution methods which the Act requires would neither significantly burden refiners which must conform to these requirements, nor otherwise disrupt the natural functioning of the retail gasoline market. Appellees' Brief, pp. 27-33. This astonishing conclusion is based on several subsidiary arguments, each of which is wholly at variance with the record.

First, the State argues that companies like Ashland, which has never used dealers to operate its private brand outlets, could nonetheless continue to participate in the retail market by converting to dealer operations. *Id.* at 30-31. This claim flies in the face of the unanimous testimony of all witnesses at the trial — including the

[2]All refiners, major or independent, need assured outlets for the sale of their production because refining is capital intensive and thus is not efficient unless plant capacities are fully utilized. The majors achieve this objective by sales to branded dealers, who represent a controlled market for their refinery production. Independents, on the other hand, sell primarily at wholesale to purchasers over whom they have no control, and thus are vulnerable to fluctuations in the price of crude oil supplies — over which they also have no control. The independents' response to this problem has been to acquire a limited number of direct retail sales outlets in order to balance demand during periods when market conditions temporarily force wholesale prices above competitive levels. These retail outlets provide an essential economic protection; their loss would seriously undermine the independents' competitive position in the national petroleum industry. See Appellants' Brief, pp. 9-12.

State's own expert. (A. 357, 450, 455, 503-04, 508, 517, 628). It is based on nothing more substantial than the assertion that two of the independents operating in the market (Hess and Crown) do in fact use dealers. However, the record is barren of any evidence which shows that these companies' contractual arrangements with their "dealers" are in compliance with the Act,[3] that the stations these "dealers" operate are comparable to the private brand outlets operated by Ashland, or that such stations are profitable.[4]

Second, the State speculates that, even if Ashland and similarly situated companies were forced to sell their private brand outlets, the impact of this loss "does not reach constitutional proportions" because marketers not affiliated with refiners might purchase these stations and continue to operate them with company personnel. Appellees' Brief, p. 31. There is, of course, no evidence that such buyers exist, or that independent marketers operating elsewhere would choose to invest in Maryland in sufficient numbers to replace the departing refiner-marketers. What

[3]The Act not only prohibits the use of salaried company personnel to operate refiner-owned service stations, but also proscribes operation by means of "commissioned agents," management contracts, and similar fee arrangements. Although the matter was not at issue before the trial court, there is reason to believe that the Hess and Crown "dealers" are actually "commissioned agents." (A. 460-61).

[4]The fact that Ashland might possibly continue to operate its stations with dealers, even if true, does not mean that compliance with the mandated change in distribution methods would not be burdensome. The private brand stations which Ashland operates depend for their economic viability upon high sales volumes, which in turn requires that prices be maintained at competitively low levels. This essential feature could no longer be assured if the stations were converted to dealer operations. (A. 357, 450, 455, 503-04, 508, 517, 628). The inevitable result of conversion, therefore, would be to raise prices and lower volumes, which would in turn reduce efficiency and undermine Ashland's competitive position in the retail market.

the record *does* show is that successful independent marketers tend eventually to integrate backward into refining as they grow in size and their needs for assured supplies increase. (A. 378-80, 427-29).[5] Consequently, even independent marketers would be discouraged from large-scale entry into Maryland because that decision would also require a decision to forego all future prospects for expansion into refining.

Finally, the State says this Court need not be concerned if companies such as Ashland no longer participate in the retail market, because they might still continue to sell their products at wholesale. Appellees' Brief, pp. 31-32. So they might, but only at increased costs due to loss of efficiency in overall operations.[6] Moreover, there is no reason to assume that Ashland or other similar companies would increase their *Maryland* wholesale sales to make up for the loss of retail sales; the most likely response would be to divert the gasoline to other markets where it could be more profitably sold. (A. 508). The suggestion that other refiners — notably the major oil companies — would take the independents' place in the *wholesale market* ignores the historic position of independent refiners as the principal source of wholesale supply for non-integrated retailers. (A.

[5]A recent example is Hudson Oil Company, which acquired a refinery subsequent to the trial. Hudson's owner testified she would give up her Maryland stations rather than abandon her refinery acquisition plans. (A. 518-19).

[6]Ashland's witness testified that loss of the retail stations could jeopardize its Maryland wholesale operations because it can supply this market only by means of an exchange agreement, and it could not meet is obligations under this agreement if the retail stations were not available to balance fluctuations in wholesale sales. (A. 509-10). After the Jurisdictional Statements were filed, PMC sold its Maryland stations to another refiner. Commonwealth hopes to continue wholesale operations in Maryland, but its witness testified he doubted the company could "even remain in the harbor" as a wholesaler because loss of the retail stations would reduce total volume by 60 to 75 per cent. (A. 463).

509, 623-24). There is no evidence whatever that the majors would increase supplies to the wholesale market if independent refiners were discouraged from sending their products into Maryland. The major oil companies have no incentive to increase supplies to independent marketers that compete with their own dealers; it is more reasonable to expect that they will increase sales through their dealer-operated stations if the independents' retail sales decline.

The record demonstrates that the Act creates positive disincentives for certain firms to do business in the State, and positive incentives for others to withdraw. (A. 383). Even if this does not reduce the total volume of gasoline transported into Maryland, it will surely change the market structure by weakening the independent refiners that supply it at retail and wholesale and by discouraging potential entrants at both levels of distribution. The likely result will be fewer — not more — private brand stations (A. 533-34), and higher — not lower — retail prices (A. 501-05, 531-32). To suggest that this does not burden interstate commerce in a constitutionally meaningful way is to ignore reality.

2. THE MARYLAND ACT DISCRIMINATES AGAINST INTERSTATE COMMERCE

The State argues that the Act does not discriminate against interstate commerce because "the statute accords even-handed treatment on its face *to all producers and refiners of petroleum.*" Appellees' Brief, p. 23 (emphasis added). This is true, but irrelevant. The Act does not and could not regulate crude oil production or refining, because all such activities take place wholly outside the State. What the Act regulates is *gasoline retailing*. And it does so in a manner which plainly discriminates against out-of-state retailers to the benefit of their local competitors.

The Maryland Act prohibits refiners from engaging in the direct retail sale of gasoline within the State, and reserves

this trade exclusively for dealers, wholesalers and other marketers not affiliated with refiners. The dealers are local residents of the State (A. 755), as are most of the wholesalers. (A. 569). The refiner-marketers are all out-of-state businesses. The statute thus prohibits an entire class of out-of-state merchants from continuing to sell at retail, while the local sellers with which they compete are left unaffected. To say that this result does not discriminate against interstate sellers stretches credulity past the breaking point.

The State correctly observes that some out-of-state businesses which are not affiliated with refiners may continue to operate retail service stations with company employees. Appellees' Brief, p. 24. This, however, does not save the statute. The law does not insulate state legislation from the sweep of the Commerce Clause merely because some local businesses are equally affected by its terms, *Dean Milk Co. v. City of Madison*, 340 U.S. 350, 354 (1951); *Nippert v. City of Richmond*, 327 U.S. 416, 431 (1946); nor should it do so simply because a few interstate businesses are not affected.[7] The issue, as always, is whether the economic impact of the state law "will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940).

The vast majority of retail gasoline outlets in Maryland are conventional major brand service stations operated by independent dealers. The most significant source of price competition for these dealer-operated stations is provided by a relative handful of limited-service "gas and go" outlets selling private brands of gasoline at discount prices. More than half of these private brand stations are operated by refiners using company personnel. If the Act is sustained,

[7]As of July 1, 1974, companies not affiliated with refiners operated only 36 of the 233 company-operated retail outlets in the State. The remaining 197 were operated by refiners. See Appellants' Brief, p. 8 n.9.

these refiner-operated private brand stations must either be converted to dealer-operations—with a resulting loss of efficiency and competitive vigor, sold to eligible marketers — if buyers can be found, or closed. The direct, obvious and undeniable effect of the Act will be to eliminate at least some private brand stations and to reduce the effectiveness of those that remain. The Act also discourages entry of new suppliers, which further weakens the private brand segment of the market.[8] This result, which benefits only local dealers and wholesalers at the expense of their interstate competitors, is plainly discriminatory.

The State asserts that the Act's purpose was not to discriminate, but rather to deny "producers the power to focus windfall profits obtained from crude prices" and to assure that "gasoline will flow in the wholesale market to the truly independent marketer." Appellees' Brief, p. 33. This, however, is a *post hoc* rationalization developed after the State realized the Act could not easily be defended as a dealer protection measure.[9]

The legislative history contains no indication whatever that the Act was intended to benefit independent marketers.[10] What it shows instead is that the Act was pushed through the Legislature at the insistence of local dealers, who claimed they were the victims of a "sinister threat of the major oil companies" to replace them "with a limited number of company-operated 'Gas & Go' outlets which sell gasoline only with no service to the motorist." (A. 756, 758). The focus of the dealers' complaints was on

[8]The effects of the Act are discussed in Appellants' Brief at 15-17.

[9]The State was more candid at the inception of this litigation, and admitted in its answers to the appellants' bills of complaint that the Act was designed to preserve the "economic welfare and continuing existence of retail service station dealers." (A. 145; see also, A. 29, 51, 77, 104, 128).

[10]This history is described in Appellants' Brief at 32-36.

alleged unfair practices by their major oil company suppliers, but the relief they sought applied to *all* refiners — including those which have no dealers. The legislation they supported would also have prohibited wholesalers from engaging in direct retailing, but these "local businessmen" objected and were amended out. (A. 568, 569; J.A. 131a). The obvious purpose of the Act was to protect dealers from competition by whatever means the Legislature could be persuaded to adopt. It is difficult to conceive of a clearer example of the use of "local political power" to discriminate against interstate interests. *See Nippert v. City of Richmond*, 327 U.S. at 434; *Raymond Motor Transportation, Inc. v. Rice*, No. 76-558, slip op. at 14 n. 18, 17-18 (Feb. 21, 1978).

The State's final argument is that the Act cannot be discriminatory because it does not "prohibit or curtail the flow of interstate goods." Appellees' Brief, p. 25.[11] It asserts that this distinction is "controlling" in cases where state regulations are challenged as discriminatory. *Id.* However, the cases cited for this proposition do not support it.

In *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951), this Court held that an interstate gas transmission company could be prohibited from making direct sales to industrial customers unless it first obtained a certificate of public convenience and necessity from the Michigan Public Service Commission. The decision rested on the reasonableness of requiring the interstate seller to comply with the same certification procedures as applied to all sellers in the regulated market, not on the fact that it might have continued to sell the same amount of gas by routing it through a local utility. The Maryland Act, by contrast, absolutely prohibits refiners from participating in gasoline retailing

[11]The error of this view, as it applies to burdens on interstate commerce, has already been exposed. See p. 3, *supra*.

in *any* circumstance. This protects local dealers from competition by interstate refiner-marketers, and therefore works a practical discrimination against interstate commerce.

Breard v. Alexandria, 341 U.S. 329 (1951), also cited by the State, is similarly inapposite. *Breard* held that a local ordinance prohibiting door-to-door solicitors did not violate the Commerce Clause, even though its acknowledged effect was to benefit local merchants at the expense of companies relying primarily on travelling salesmen. In so holding, the Court observed that the complainants could still sell their products by means other than door-to-door solicitation. *Id.* at 638. The decision does not, however, stand for the proposition that a restriction on interstate business activity cannot be discriminatory unless the regulation completely prohibits the interstate sellers from participating in the local market, but rather rests on the finding that the admittedly discriminatory ordinance was justified by an overriding state interest in preserving the "privacy and repose" of local citizens. *Id.* at 626. Whether the economic discrimination caused by the Maryland Act can be justified is not answered by a blind appeal to *Breard*, but must instead be evaluated in light of the local interests the Act purports to serve.

3. THE DISCRIMINATORY BURDENS IMPOSED BY THE MARYLAND ACT CANNOT BE JUSTIFIED BY ANY LEGITIMATE LOCAL INTEREST

The *Bruce Church* balancing test contemplates an initial assessment of the practical effects of state regulation to determine whether the regulation substantially burdens interstate commerce or otherwise discriminates against it. If the regulation burdens (but does not discriminate against)

interstate commerce, the Court will sustain it unless the burden imposed "is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. To decide this question, the Court considers "the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities." *Id.* If the regulation also discriminates against interstate commerce, the balance shifts and "the burden falls on the State to justify [the regulation] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission*, 97 S.Ct. at 2446.

Although the State claims the Act should be sustained under the *Bruce Church* test, it makes no serious effort to identify the putative local interests the Act purports to serve, to explain how prohibiting refiners from operating retail gasoline outlets will promote these interests, or to demonstrate that these interests could not be as well achieved by less burdensome means. It simply asserts that Maryland has a "substantial" interest in preventing "forward vertical integration by oil companies into local retail marketing at the expense and detriment of independent businessmen." Appellees' Brief, p. 33. The question, however, is not whether the State *believes* "forward vertical integration" is an "evil," but whether participation by refiners in retailing is *in fact* so harmful that a total prohibition of this activity is justified. *Raymond Motor Transportation, Inc. v. Rice*, No. 76-558, slip op. at 15, 18 (Feb. 21, 1978).

The only reason the State offers for excluding refiners from retailing is a supposed need to halt "the recent trend of increased direct operation of service stations by producers and refiners" which, "if allowed to continue, could substantially decrease competition and lead to the control of that market by a few major oil companies."

Appellees' Brief, pp. 24-25.[12] This, however, refers to a supposed tendency of *major oil companies* to use more company-operated outlets in their retail operations. It says nothing whatever about independent refiners which do not use dealers, have never done so, and could not continue to compete at retail if they are prevented from using company outlets to distribute their products. Exclusion of these companies from the retail marketplace would not enhance competition, but would weaken it by removing the principal source of price competition to dealer-operated major brand service stations. The Act will not, as alleged, prevent "a few major oil companies" from taking over the retail market; its actual effect will be to eliminate the major oil companies' only substantial competitors.[13]

The State cannot offer a justification for excluding independent refiners from retail marketing, because none exists. "[T]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. at

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[12]The State may have admitted more than it intended when it says in the very next sentence that "[t]he prevention of . . . destructive competition is a wholly appropriate legislative function . . . permissible under the Commerce Clause." Even if this is an accurate statement of the law, it is still incumbent on the State to explain why the competition provided by refiner-marketers is "destructive" and how "healthy" competition will be enhanced by excluding refiner-marketers from the market. The State's failure even to attempt an explanation speaks for itself.

[13]We do not contend that Maryland has no power to regulate gasoline retailing. We simply argue that the statute at issue here violates the Commerce Clause because the discriminatory burden which it imposes on independent refiner-marketers actually conflicts with the only interest the State claims the Act will serve. The State apparently believes some form of regulation is needed to protect "independent businessmen" from "destructive competition." However, it has not even considered whether less burdensome or less discriminatory legislation might serve that interest equally well. The absence of any such consideration is, we submit, decisive under the *Bruce Church* test.

370. The freedom which it protects "is a freedom to trade with any State, to engage in commerce across all state boundaries." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). The unwarranted exclusion of independent refiners from the Maryland retail market subverts this fundamental constitutional principle.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1977

No. 77-10

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Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION OF CROWN CENTRAL PETROLEUM CORPORATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Pursuant to Rule 42 of the Rules of this Court, Crown Central Petroleum Corporation (hereinafter "Crown") respectfully moves the Court for leave to file the attached brief *amicus curiae* in the above entitled case. The brief supports the position of the Appellants (hereinafter the "Oil Companies"), stated in their several jurisdictional statements, that Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, and codified in the Maryland Annotated Code (1957) Article 56, § 157E, (1972 Repl.

Vol., 1976 Cum. Supp.) hereinafter ("the Act" or "the Maryland Act") is invalid under the Commerce Clause of Article I Section 8 of the United States Constitution and the Supremacy Clause of Article VI of the Constitution.

Counsel for the Appellants and Appellees have declined to consent to the filing of this *amicus* brief.

NATURE OF CROWN'S INTEREST AS AMICUS CURIAE

Crown is a Maryland corporation which is engaged in all aspects of the petroleum business, including producing, refining and marketing gasoline. The gasoline is produced at its refinery near Houston Texas and is marketed in interstate commerce under its trade and service mark "Crown" in a number of states, including Maryland.

Crown was a pioneer in developing the marketing technique of retailing gasoline through high volume service stations which are operated twenty-four hours per day, seven days per week, which concentrate on the sale of gasoline and which do not provide the repair and other services provided by conventional lower volume service stations. Its mark "Crown" is registered with the United States Patent Office under the Lanham Act, 15 U.S.C. § 1051 *et. seq.*, both as a trademark to identify the product and as a service mark to identify Crown's distinctive method of marketing. By virtue of such registration Crown has the exclusive right to utilize such mark both to identify the product and to identify its distinctive marketing system.

As of November 10, 1977, Crown owned or leased forty-four retail service stations in Maryland of which thirty-three were leased or subleased to dealers and eleven were company operated. Forty-two of these stations are identified by signs bearing the registered

mark "Crown" so as to enable the public to recognize them as "multi-pump" outlets featuring high volume sales of gasoline at generally competitive discount prices, around-the-clock service and the other concepts associated with Crown's distinctive method of marketing. The provisions of the Maryland Act will require Crown to cease operating the service stations which are now operated by it and thereby prevent it from exercising the rights granted to it by the Lanham Act.

Crown believes that the Oil Companies have not brought, and are not likely to bring, to the attention of this Court the conflict between the Maryland Act and the rights under the Lanham Act of the owner of a service mark to use and regulate use of such mark as a means of identifying a particular marketing system and technique and that consequently the existence of such conflict may be overlooked by this Court.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Motion be granted in order that Crown and other owners of service marks not be prejudiced by failure of this Court to consider the conflict between the Maryland Act and the provisions of the Lanham Act granting to the owner of a registered mark the right to utilize such mark to the exclusion of others as a means of identifying each owner's particular method of marketing.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE

Crown Central Petroleum Corporation (hereinafter "Crown") is a Maryland Corporation with its corporate headquarters and principal offices in Baltimore, Maryland. Crown is engaged directly and through subsidiaries in all aspects of the petroleum business including production, refining and marketing of gasoline and other petroleum products in twenty-seven states and the District of Columbia.

Crown is not a "major" oil company and its retail outlets are considerably different from the "conventional" or "full-service" bay-type services stations traditionally operated by the "majors". Crown is to be distinguished from the "major" oil companies which are characterized by extensive production of crude oil, large refining capacity and distribution of gasoline through service station networks extending throughout entire regions. Because of the importance of these factors and Crown's relative weakness in these areas, it can only achieve competitive viability by maximizing efficiencies in its retail marketing operations and by the use of innovative concepts to stimulate brand recognition and public acceptance.

As is described in detail in the "Findings of Fact" in the opinion of Judge Young in *Crown Central Petroleum Corporation v. Zarb*, not officially reported, D. Md. 1975, Civil No. Y-75-397, 3 CCH Federal Energy Guidelines Par. 26,028, after many years of operating with marginal results under a conventional approach like that of the "majors", Crown developed during the late 1960's and early 1970's, a high-volume minimal-service, low-cost marketing approach, which it called its "multi-pump" program. Somewhat analogous in concept to "fast foods" restaurants and chain supermarkets, the "multi-pump" program is characterized by retail stations which emphasize high-volume obtained by competitive discount prices, spacious, attractive, clean, well-lighted service stations open twenty-four hours a day, seven days a week, featuring fast, efficient service, and without the service bays and resultant clutter and inefficiency associated with the full-service type of station. In conjunction with the development of this new marketing technique, Crown adopted a new method of displaying its mark "Crown" and on April 13, 1971, registered this new form with the United States Patent Office, as both a trade mark for gasoline and a service mark for gas station services.[1]

[1] Crown had previously registered the word "Crown", both separately and in conjunction with other devices, as a trademark for gasoline and other petroleum products.

Crown operates all of its "multi-pump" stations under its federally registered mark and has developed substantial customer goodwill associated with this mark. At present Crown owns or leases 163 "multi-pump" outlets in nine states which are identified by this service mark, including forty-two such stations in Maryland, of which thirty-two are operated by independent dealers and ten are company-operated. Under the provisions of the Lanham Act, 15 U.S.C. § 1501 *et. seq.*, (a) this is use of the service mark in interstate commerce since the services are rendered in more than one state and Crown is engaged in interstate commerce in connection therewith by reason of the shipment of the gasoline from Texas to other states in which the service stations are located, 15 U.S.C. § 1127, and (b) by virtue of such registration Crown has the exclusive right to use such service mark, 15 U.S.C. § 1115(b).

The principal thrust of the Maryland statute at issue in this case (Maryland Annotated Code (1975), Art. 56, § 157E (1972 Repl. Vol. and 1976 Cum. Supp.)), are the requirements in § 157E(b) that "no producer or refiner of petroleum products shall open a . . . retail service station in the State of Maryland, and operate it with company personnel . . . [and t]he station must be operated by a retail service station dealer" and in § 157E(c) that "no producer or refiner of petroleum products shall operate a . . . retail service station in the State of Maryland . . . [and t]he station must be operated by a retail service station dealer."

It is Crown's contention that these provisions prevent it, and other producers or refiners of petroleum products who have federally registered service marks identifying distinctive means of marketing gasoline, from exercising its and their federally granted rights throughout the United States. In particular, this Maryland statute precludes Crown from making any use of its federally registered service mark in Maryland otherwise than by granting rights to others.

ARGUMENT

THE DIVESTITURE PROVISIONS OF THE MARYLAND ACT ARE INVALID AS CONFLICTING WITH THE FEDERALLY PROTECTED EXCLUSIVE RIGHT TO USE A SERVICE MARK IN INTERSTATE COMMERCE.

A. *The Maryland Act*

The Maryland statute which is the subject of this case is a part of the Maryland Motor Fuel Inspection Law, and is codified in Maryland Annotated Code (1957), Article 56, § 157E, (1972 Repl. Vol., 1976 Cum. Supp.), as enacted by Maryland General Assembly in Chapter 854 of the Laws of 1974 as amended by Chapter 608 of the Laws of 1975. The principal thrust of the law is found in the "divestiture" requirements of sub-sections (b)[2] and (c)[3] prohibiting any producer or refiner of petroleum products from opening or operating a retail service station in Maryland and requiring that such service stations must be operated by service station dealers. As the Court of Appeals of Maryland concluded in its opinion upholding the constitutionality of the Act, the effect of these provisions is to prohibit the appellants, *amicus,* or any other oil company which produces or refines petroleum products from operating a service station except by leasing it to an independent dealer.

[2] "(b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer."

[3] "(c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer."

(279 Md. 410, 437, 370 A.2d 1102, 1117). The terms of such leases are regulated by Maryland's Gasoline Products Marketing Act (Subtitle 3 of the Commercial Law Article of the Annotated Code of the Public General Laws of Maryland, enacted by Chapter 49, Acts 1975, as amended by Chapter 624, Acts 1975),[4] which is reproduced in full (without annotations) in Appendix A, and accordingly the validity of this requirement for leasing must be determined in light of the Gasoline Marketing Products Act.

B. *The Exclusive Right To Use Of A Federally Registered Mark In Interstate Commerce Is Guaranteed By The Lanham Act.*

The Lanham Act, 15 U.S.C. § 1051, *et. seq.*, was enacted by Congress in 1946 to deal comprehensively and completely with the registration and use of various types of marks[5] in interstate and foreign commerce. The general thrust of the Act was to ensure to federal registrants the right to use their marks throughout a nationwide market. Although the protection of trade-marks was premised on the related goods being sold in commerce (defined as meaning "all commerce which may lawfully be regulated by Congress"), the protection of service marks was extended to cover cases where the

[4] The Maryland legislature is engaged in making a complete revision of the Maryland Code by enacting Articles designated by discriptive titles such as "Commercial Law Article", "Corporations and Associations Article", etc. which incorporate provisions pertaining to the designated subject matter which were previously contained in several numbered Articles.

[5] Under 15 U.S.C. § 1127 the term "mark" is defined as meaning "any trade-mark, service mark, collective mark or certification mark", the term "trade-mark" is defined as meaning "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others" and the term "service mark" is defined as meaning "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others . . . ."

related services are rendered in more than one state or in this and a foreign country and the person rendering the services is engaged in commerce in connection therewith. 15 USC § 1127.

The Lanham Act assures that with certain precisely defined exceptions the owner of a federally registered mark has the "exclusive right to use the registered mark in commerce. . . ." 15 USC § 1115. Such exclusive right of use of necessity involves a right to make a direct use, as distinguished from a use solely by licensees,[6] although licensing was also permitted by 15 USC § 1055 which provides:

> "Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies,[7] such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public."

[6] Originally a mark could be used only by the owner and the granting of a license to others was deemed to be tantamount to a fraud upon the public which could result in the loss of the exclusive right of use. See *Manhattan Medicine Co. v. Wood,* 108 U.S. 218 (1883); *Bulte v. Igiehart Bros.,* 137 Fed. 492 (7th Cir. 1905); *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.,* 113 Fed. 468 (1901). Over the years preceding the enactment of the Lanham Act the doctrine had gradually evolved that a mark could function not only as a means of identifying the purveyor of the goods or services but also as an assurance of quality and that consequently, the granting of licenses to use the mark would not invalidate the mark provided the owner of the mark exercised a sufficient degree of control over the licensee. See *Isaacs, Traffic In Trade Symbols,* 44 Harv. L. Rev. 1210 (1931); See *Crown Fabrics Corp. v. American Viscose Corp.,* 145 F.2d 246 (CCPA 1944); *E. I. DuPont de Nemours & Co. v. Celanese Corp.,* 167 F.2d 484 (CCPA 1948).

[7] The term "related company", previously unknown in the law of tradmarks, is defined in 15 U.S.C. § 1127, as:

> "any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used."

The purpose of Congress in enacting the Lanham Act was not only to establish a system of federal registration for the various types of marks, including trade and service marks, but also to grant substantive rights to the owners of such marks. The rationale for this scheme was set out as follows in Senate Report No. 1333, U.S. Code Congressional Service, (79th Congress 2d Sess., 1946) 1274, 1276-77:

> "The theory once prevailed that protection of trademarks was entirely a State matter and that the right to a mark was a common-law right. This theory was the basis of previous national trademark statutes . . . . A man's rights in his trademark in one State may differ widely from the rights which he enjoys in another.
>
> However, trade is no longer local, but is national. Marks used in interstate commerce are properly the subject of Federal regulation. It would seem as if national legislation along national lines securing to the owners of trade-marks in interstate commerce definite rights should be enacted and should be enacted now.
>
> There can be no doubt under the recent decisions of the Supreme Court of the constitutionaltiy of a national act giving substantive as distinguished from merely procedural rights in trade-marks in commerce . . . and . . . a sound public policy requires that trade-marks should receive nationally the greatest protection that can be given them."

See generally, *Dawn Donut Co. v. Hart's Food Stores, Inc.,* 267 F.2d 358, 362 (2nd Cir. 1959), where Judge Lumbard confirmed that it was the purpose of Congress to "afford . . . nationwide protection to registered marks, regardless of the areas in which the registrant actually uses the mark. . . ."

In the last grammatical paragraph of 15 USC § 1127 Congress made it clear that not only did it intend to regulate the use of marks in commerce within its power to control, but most importantly, that it also intended

"to protect registered marks used in such commerce from interference by State, or territorial legislation."

C. *The Maryland Act Directly Conflicts With And Is Preempted By The Lanham Act*

Several recent cases have recognized the primacy of the Congressional policies embodied in the Lanham Act and have held that any contrary state laws are preempted and invalid. Thus, in *Mister Donut of America, Inc. v. Mr. Donut, Inc.*, 418 F.2d 838 (9th Cir. 1969), the Ninth Circuit rejected the plaintiff's contention that, under California law, it had broader rights to the use of its federally registered trademark *vis-a-vis* the defendant's unregistered common-law trademark than had been granted by Congress, stating:

> "What the effect of this California statutory provision might be if the Lanham Act had not been passed by Congress, we need not decide. The Lanham Act has pre-empted the field of trademark law and controls." (418 F.2d at 844).

Similarly, in *Burger King of Florida, Inc. v. Hoots*, 403 F.2d 904, 908 (7th Cir. 1968), it was held that the defendant could be entitled by virtue of its state registration to no right which would foster "an interference with plaintiffs' exclusive right in interstate commerce to use its federal mark."

The Maryland Act constitutes a clear and direct interference with the rights of producers or refiners of petroleum products who own registered service marks, such as Crown, to exercise the full scope of the rights granted to them by the Lanham Act to utilize such service marks in the marketing of gasoline in Maryland. As noted *supra* at p. 4, the effect of the Maryland Act as construed by the Maryland Court of Appeals is to prohibit producers or refiners from operating gasoline service stations (an otherwise completely lawful business) in Maryland and to require that all such stations be operated by dealers. The resulting consequence is to absolutely prevent Crown from utilizing its service mark in Maryland otherwise than by licensing others to use it. Moreover, under the terms of the Gasoline Products Marketing Act, such licensing must comply with various requirements and may not contain certain provisions.

The Maryland Act's prohibition against direct use of a service mark by the owner of such mark in an otherwise lawful business is legally identical to the Puerto Rican prohibition against the owner's use of certain trademarks is an otherwise lawful business which was invalidated by this Court in *Bacardi Corp. v. Domenech*, 311 U.S. 150 (1940). The Puerto Rican statute under consideration generally regulated the manufacture of alcoholic beverages in Puerto Rico, and Bacardi Corp. was the holder of a permit authorizing it to conduct such manufacturing in Puerto Rico. The Puerto Rican statute contained provisions which "prohibited the holder of a permit from manufacturing any distilled spirits which were 'locally or nationally known under a brand, trade name, or trademark previously used on similar products manufactured in a foreign country, or in any other place outside Puerto Rico.'" 311 U.S. at 153. Bacardi Corp. was the licensee of the Cuban corporation which owned the "Bacardi" and related trademarks. The right to use those marks, which had originated in Cuba, was assured by a treaty between the United States, Cuba and a number of other American States. This Court held that although Puerto Rico could have completely prohibited the manufacture of rum in Puerto Rico, 311 U.S. at 156-157, 168, it could not concurrently permit the manufacture of rum and prohibit the use in such manufacture of a trademark which the manufacturer was otherwise entitled to use under a treaty of the United States, and that accordingly so much of the Puerto Rican statute as "prohibited . . . the use of its [Bacardi's] trademarks, although

valid and duly registered and although the product to which they are applied is otherwise lawfully made and the subject of lawful sale, solely because the marks had previously been used outside Puerto Rico . . .", was invalid under the Supremacy Clause. 311 U.S. at 157, 167.

It is not necessary in the present case to consider whether or not Maryland could completely prohibit the sale of gasoline from service stations or could prohibit any use of a service mark to identify the service station, since it has not attempted to do so. What Maryland has attempted to do is to prohibit any use of a service mark by a refiner or producer of gasoline otherwise than pursuant to licenses which are granted to dealers and which meet the requirements of the Gasoline Products Marketing Act. This directly conflicts with the intent of the Congress that, subject only to those limitations which have been imposed by Congress, the owner of a federally registered service mark should have the right to use the mark in the conduct of the business to which the service mark pertains in all places in the United States in which such business may be lawfully conducted and should have the further right to decide for itself whether such use should be a direct use or a use which is licensed pursuant to 15 USC § 1055.

The question of whether a state may constitutionally limit use of a federally registered mark solely to a use through licensing in accordance with terms prescribed by the state is entirely different from the superficially similar question of whether a state may constitutionally prohibit the granting of licenses on terms which conflict with some generally applicable public policy of the state. As was properly pointed out by the Court of Appeals for the Third Circuit in *Mariniello v. Shell Oil Company,* 511 F.2d 853, 858 (3rd. Cir. 1975) a license to use a mark is a contract, the mere fact that the subject matter of the contract is a federally protected mark does

not warrant the inclusion of provisions violative of the public policy of the state involved and accordingly such provisions may be held unenforceable "even though the freedom of a trademark holder to dictate the terms of its licensing arrangement would thereby be curtailed to some degree". See also *Becker v. Crown Central Petroleum Corporation,* 26 Md. App. 596, 340 A.2d 327 (Maryland Court of Special Appeals, 1975), where the court held that the regulation by the Gasoline Products Marketing Act of contracts which had been voluntarily entered into between Crown and one of its service station dealers did not necessarily conflict with Crown's rights under the Lanham Act.

There is obviously an enormous difference between a prohibition against the inclusion in licensing contracts which are voluntarily entered into of provisions that are contrary to public policy and a prohibition against making any use of the federally protected mark in Maryland otherwise than pursuant to licensing contracts which contain provisions dictated by Maryland. The difference is exactly the same as the difference between the right of a state to direct that any lease of property must comply with requirements imposed by the state, and the non-right of the state to prohibit the owner of the property from using it himself instead of leasing it to others on terms dictated by the state. The latter type of prohibition is something far greater than a mere curtailment "to some degree" of the exercise by the registered owner of its federally granted rights.

This is particularly true where the state-mandated terms of the licensing agreement directly conflict with the marketing concept which is identified by the service mark and the state mandates that the service station dealer shall have specific valuable rights to the detriment of the owner of the federally protected mark. As indicated *supra* at p. 2, the marketing concept which is identified by Crown's service mark includes a

requirement that the stations be operated 24 hours per day, 7 days per week, yet Section 11-304(d) (Ap. A, p. 4a) purports to prohibit any requirement that the dealer keep the station open for a specified number of hours per day or days per week except "when this requirement is negotiated in good faith by both parties and arrived at in mutual agreement and it is on the basis of a bona fide business need."[8] Similarly, under § 11-304(e), the owner of the mark is prohibited from requiring the dealer to use any promotion, premium, coupon, giveaway or rebate in the operation of the station notwithstanding that this may be an essential element of the particular marketing concept. Equally objectionable are the requirements in § 11-304(g) that the owner of the mark consent to assignments, transfers, sales and renewals and in § 11-304(i) that upon termination the owner of the mark must pay the dealer for the value of any business goodwill which the dealer then enjoys.[9]

The concurrent requirements of the Maryland Act that the rights of Crown as the owner of a federally registered service mark be exercised in Maryland solely by granting licenses to service station dealers and of the Gasoline Products Marketing Act as to the terms of such licenses involve serious risks that Crown may lose its rights in its federally registered mark. A registrant

[8] It is significant to note that similar language in other statutes has been construed to necessitate an independent determination by the courts as to whether the particular requirement desired by the owner of the mark is in fact a reasonable requirement. *Raindance, Inc. v. Crown Central Petroleum Corp.*, unreported decision of the Superior Court of New Jersey, Chancery Division, Ocean County, Dkt. No. C-3279-76, June 6, 1976; *Crown Central Petroleum Corp. v. Agin*, unreported decision of the Superior Court of New Jersey, Chancery Division, Middlesex County, Dkt. No. C-2425-74, May 28, 1975.

[9] This requirement would appear to directly conflict with the provisions of 15 U.S.C. § 1055 that use by others "shall inure to the benefit of the registrant".

who licenses its mark does so at the risk of being deemed to have abandoned it if it fails properly to control the use of it by its licensees, i.e., if it fails to insist that its licensees carry out everything which the public has a reasonable right to expect to have been carried out where the mark is used. See *Dawn Donut Co. v. Hart's Food Stores, supra; Alligator Co. v. Robert Bruce, Inc.*, 176 F. Supp. 377 (E.D. Pa. 1959). Notwithstanding that Crown's marketing concept, as identified by its service mark, encompasses operations 24 hours per day, 7 days a week, and compliance with this standard has been included by Crown in its agreements with its dealers, § 11-304(d) of the Gasoline Products Marketing Act permits it to impose such requirements only by mutual agreement after negotiation and then only if it is determined that this requirement is based upon a bona fide business need. Crown and other owners of federally registered service marks may well be faced with the Hobson's choice of either abandoning the use of their marks in Maryland and making payments to their dealers for goodwill which is primarily attributable to such marks and the marketing techniques identified thereby or losing such marks because of failures by the dealers to adhere to the marketing standards identified by the marks.

It is not necessary for this Court to decide whether the enactment of the Lanham Act has completely precluded the states from enacting any statutes which may affect the terms under which federally protected marks are licensed. All that is necessary to be decided is that a state statute which prohibits any use of the federally registered mark except by licenses under terms prescribed by the state constitutes an "interference by State . . . legislation" which Congress intended to prevent. 15 USC § 1127.

CONCLUSION

It is respectfully submitted that the conflict between the Maryland Act and the Congressional policies expressed in the Lanham Act is manifest and irreconcilable and that accordingly the Maryland Act constitutes "state legislation which frustrates the full effectiveness of federal law [and] is rendered invalid by the Supremacy Clause". *Perez v. Campbell,* 402 U.S. 637, 652 (1971). We therefore respectfully request that the Court render judgment in favor of the Appellants and reverse the decision of the Maryland Court of Appeals.

Respectfully submitted,

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Dated: November 17, 1977

APPENDIX A

Maryland Annotated Code (1957)
Commercial Law Article § 11-301 — § 11-308
(1975 Ed. and 1976 Cum. Supp.)

Subtitle 3. Gasoline Products Marketing Act

§ 11-301. Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Dealer.* — (1) "Dealer" means a person engaged in the retail sale of gasoline products under a marketing agreement, at least 30 percent of whose gross revenue is derived from the retail sale of gasoline products.

(2) "Dealer" does not include an employee of a distributor.

(c) *Distributor.* — (1) "Distributor" means a person who:

(i) Engages in the sale, consignment, or distribution of gasoline products through retail outlets which he owns or leases; and

(ii) Maintains an oral or written contractual relationship with a dealer for the sale of the products.

(2) "Distributor" includes any subsidiary or affiliated corporation in which a distributor holds at least 30 percent voting control.

(d) *Marketing agreement.* — "Marketing agreement" means an oral or written agreement between a distributor and a dealer under which the dealer is granted the right, for the purpose of engaging in the retail sale of gasoline products supplied by the distributor, to:

(1) Use a trademark, trade name, service mark, or other identifying symbol or name owned by the distributor; or

(2) Occupy premises owned, leased, or controlled by the distributor.

(e) *Person.* — "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(f) *Retail sale.* — "Retail sale" means the sale of a product for purposes other than resale.

§ 11-302. Legislative declaration; statement of public policy.

(a) *Legislative finding and declaration.* — The General Assembly finds and declares that since the distribution and sale through marketing arrangements of petroleum products in the State vitally affect the economy of the State, and its public interest, welfare, and transportation, it is necessary to define the relationships and responsibilities of the parties to certain agreements pertaining to these marketing arrangements.

(b) *Statement of public policy.* — This subtitle constitutes a statement of the public policy of the State.

§ 11-303. Information to be given by distributor to prospective dealer.

Before any marketing agreement is concluded, a distributor shall disclose fully to a prospective dealer the following information:

(1) Any gallonage history of the location under negotiation for the shorter of:

(i) The three-year period immediately past; or

(ii) The entire period during which the location has been supplied by the distributor;

(2) The name, last known address, and reason for the termination of the marketing agreement of each person who was a dealer at the location during:

(i) The five-year period immediately past; or

(ii) The entire period during which the location has been supplied by the distributor;

(3) Any commitment for the sale, demolition, or other disposition of the location;

(4) Any training program and any specific goods and services which the distributor will provide for and to the dealer;

(5) Any obligation which will be required of the dealer;

(6) Any restriction on the sale, transfer, and termination of the agreement; and

(7) The total amount of any cash deposit required, any amount of interest to be paid on the deposit, and the conditions for the return of the deposit.

§11-304. Marketing agreement subject to certain provisions.

(a) *In general.* — Every marketing agreement is subject to the provisions of this section, whether or not expressly set forth in the agreement.

(b) *Dealer's right to cancel.* — (1) Until midnight of the seventh business day after the day a marketing agreement is signed or entered into, the dealer may cancel it by giving written notice of cancellation to the distributor in person or by registered or certified mail.

(2) Within 10 days after delivery of the notice of cancellation, the dealer shall return to the distributor full possession of any service station, location, money, equipment, or merchandise loaned, sold, or delivered under the marketing agreement to the dealer by the distributor.

(3) The distributor shall give the dealer full credit or its cash equivalent for all money, equipment, and merchandise returned.

(c) *Price setting.* — The distributor may not set or maintain or attempt to set or maintain the price at

which the dealer sells any product, and the price of any product may not be subject to enforcement or coercion by the distributor in any way. However, the distributor may counsel with the dealer concerning prices and may suggest prices to him.

(d) *Hours of business.* — A distributor may only require a dealer to keep his retail outlet open for business for a specified number of hours per day or days per week when this requirement is negotiated in good faith by both parties and arrived at in mutual agreement and it is on the basis of a bona fide business need.

(e) *Promotions.* — The distributor may not require the dealer to use any promotion, premium, coupon, give-away, or rebate in the operation of the business. However, if not otherwise prohibited by law, the dealer may participate in a promotional, premium, coupon, give-away, or rebate program sponsored by the distributor.

(f) *Notice of intent not to renew.* — A distributor who intends not to renew a marketing agreement shall give notice of his intent to the retail service station dealer at least 90 days before the expiration of the term of the marketing agreement, whether or not the marketing agreement contains a provision for automatic renewal or, by its terms, expires at a fixed time. Failure to give notice constitutes a renewal of the marketing agreement for a term of one year from its stated expiration date. This notice requirement supersedes the notice provisions of Article — Real Property, § 8-402(b), Annotated Code of Maryland, as well as any notice provision set forth in the marketing agreement.

(g) *Distributor may not unreasonably withhold certain consents; reasons for nonrenewal to be set forth in notice.* — The distributor may not unreasonably withhold his consent to any assignment, transfer, sale, or renewal of a marketing agreement, whether or not the marketing agreement contains a provision for

automatic renewal or, by its terms, expires at a fixed time. Notice of intent not to renew a marketing agreement shall set forth, in specific detail, the reasons relied upon by the distributor for the nonrenewal.

(h) *Repurchase on termination or cancellation.* — (1) Except with respect to a cancellation to which subsection (b) of this section applies, within 30 days after the date a marketing agreement is terminated or cancelled, whether by mutual agreement or otherwise, the distributor shall repurchase from the dealer at the then current wholesale price all merchantable products purchased by the dealer from the distributor.

(2) The distributor may apply the proceeds of any repurchased product against any existing debt owed by the dealer to the distributor.

(3) The obligation to repurchase under this subsection is enforceable only to the extent that there are no other valid claims or liens against the products by or on behalf of other creditors of the dealer.

(i) *Payment for goodwill.* — (1) In addition to the provisions of subsection (h) of this section, if, without the written consent of the dealer, the distributor terminates, cancels, or unreasonably refuses to renew the marketing agreement, the distributor shall pay to the dealer the full value of any business goodwill which the dealer enjoys at the time he is notified of the termination, cancellation, or refusal to renew.

(2) The distributor shall make the payment required by this subsection within 30 days from the effective date of the termination, cancellation, or refusal to renew.

(3) This subsection does not apply if the dealer materially breaches the marketing agreement.

(j) *Agreement may not waive certain rights.* — The marketing agreement may not waive the right of either party to trial by jury or interposition of counter-claims or cross-claims.

(k) *Service station lease providing for minimum monthly rental.* — A clause in any lease or contract from a producer or refiner to a dealer for the use of a retail service station providing for a minimum monthly rental based on a certain volume of sales is not enforceable to the extent the minimum rent exceeds a sum equal to the minimum rent provided for in the lease or contract times a fraction, the denominator of which is the number of gallons of gasoline on which the minimum rent is based and the numerator of which is the number of gallons of gasoline made available by the producer or refiner to the dealer for that month.

§ 11-305. Defenses to action based on termination or cancellation of marketing agreement.

Subject to the notice requirements of §11-306, in any action filed under this subtitle which is based on a termination or cancellation of a marketing agreement, it is a defense that the marketing agreement was terminated or cancelled:

(1) By mutual agreement of the parties;

(2) Because of the bankruptcy or insolvency of the dealer;

(3) Because the dealer failed to comply with an express requirement of the marketing agreement; or

(4) Because the dealer failed to act in good faith in carrying out the terms of the marketing agreement.

§ 11-306. Notice of intent required to raise defenses.

(a) *Notice required to raise defense.* — A party to a marketing agreement may not raise any defense set out in §11-305 unless he gives written notice to the other party of his intent to terminate or cancel the agreement. This notice shall be given in person or by registered or certified mail at least 60 days before the date on which he intends to terminate or cancel it.

(b) *When notice not required.* — The 60-day notice is not required if at the time of termination or cancellation

of the marketing agreement any of the following is proven:

(1) Criminal misconduct;

(2) Fraud;

(3) Abandonment;

(4) Bankruptcy or insolvency of the dealer;

(5) Adulteration of product; or

(6) Giving a check which is dishonored for insufficient funds.

(c) *Notice by registered or certified mail.* — If notice is given by registered or certified mail, it shall be effective on the date of mailing.

§ 11-307. Remedies.

Any person who violates any provision of this subtitle is liable for damages caused by the violation and is subject to the other legal or equitable remedies available to the party injured by the violation.

§ 11-308. Short title.

This subtitle may be cited as the Maryland Gasoline Products Marketing Act.

Nos. 77-10, 77-11, 77-12, 77-47, 77-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

EXXON CORPORATION, *et al.*, *Appellants,*

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

On Appeal from the Court of Appeals
of Maryland

BRIEF OF AMICI CURIAE

FILED ON BEHALF OF CHAMPLIN PETROLEUM COMPANY, CITIES SERVICE OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, KERR-McGEE CORPORATION, KOCH REFINING COMPANY, MARATHON OIL COMPANY, THE STANDARD OIL COMPANY (OF OHIO), SUNMARK INDUSTRIES, A DIVISION OF SUN OIL COMPANY OF PENNSYLVANIA, TENNECO OIL COMPANY AND TESORO PETROLEUM CORPORATION.

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S. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 18

Supreme Court Rule 42(1) 7

2A Sutherland, Statutes and Statutory Construction § 46.06 (4th ed. C. Sands 1973) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47, 77-64

EXXON CORPORATION, *et al., Appellants,*

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al., Appellees.*

On Appeal from the Court of Appeals of Maryland

BRIEF OF AMICI CURIAE

FILED ON BEHALF OF CHAMPLIN PETROLEUM COMPANY, CITIES SERVICE OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, KERR-McGEE CORPORATION, KOCH REFINING COMPANY, MARATHON OIL COMPANY, THE STANDARD OIL COMPANY (OF OHIO), SUNMARK INDUSTRIES, A DIVISION OF SUN OIL COMPANY OF PENNSYLVANIA, TENNECO OIL COMPANY AND TESORO PETROLEUM CORPORATION.

INTEREST OF AMICI CURIAE

The *amici curiae* are a group of ten companies involved in the petroleum industry: Champlin Petroleum Company; Cities Service Oil Company; Getty Refining and Marketing Company; Kerr-McGee Corporation; Koch Refining Company; Marathon Oil Company; The Standard Oil Company (of Ohio); Sun-

mark Industries, A Division of Sun Oil Company of Pennsylvania; Tenneco Oil Company; and Tesoro Petroleum Corporation. Some of the *amici* engage in petroleum production, refining and marketing;[1] others engage only in petroleum refining and marketing.[2]

No member of the *amici* group engages in petroleum production or refining in Maryland. Indeed, there is not now, and never has been, any petroleum production or refining in Maryland. (App. A, p. 19a.)[3] Several

[1] Champlin Petroleum Company (wholesale marketing in the southwest, southeast and eastern seaboard, retail marketing in the mid-continental states); Cities Service Oil Company (marketing in twenty-seven states east of the Mississippi River); Kerr-McGee Corporation (marketing primarily in the midwest and southwest); Marathon Oil Company (wholesale marketing in the eastern half of the United States, retail marketing in six midwestern states); The Standard Oil Company (of Ohio) (marketing either directly or through subsidiaries in Ohio, Pennsylvania, Michigan, Kentucky, West Virginia, Indiana, New England and the Mid-Atlantic regions); Tenneco Oil Company (marketing primarily in the southeastern and Atlantic seaboard areas); Tesoro Petroleum Corporation (marketing in California, Connecticut, New Jersey, New York and Pennsylvania).

[2] Getty Refining and Marketing Company (marketing in twelve northeastern states under the "Getty" brand name and in the midwest under the "Skelly" brand name). Getty Oil Company, the parent of Getty Refining and Marketing Company, also engages in petroleum production. Koch Refining Company (marketing in 36 states through a subsidiary, Koch Marketing Company). Koch Industries, Inc., a parent company, also engages in petroleum production. Sunmark Industries, A Division of Sun Oil Company of Pennsylvania (marketing in the eastern two-thirds of the United States). Sun Oil Company of Pennsylvania engages in petroleum refining; a related company engages in petroleum production.

[3] References to appendices are to those contained in the joint Appendix filed by Exxon Corporation, the Phillips Petroleum Company, Gulf Oil Corporation, Continental Oil Company and its subsidiary, Kayo Oil Company, Shell Oil Company, Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation accompanying their jurisdictional statements.

members of the *amici* group engage in marketing petroleum products in Maryland through retail service stations, some of which are company operated and some of which are operated by independent dealers.[4] Other members of the *amici* group do not engage in retail marketing of petroleum products in Maryland.[5]

The Maryland statute upheld by the court below directly, substantially and adversely affects the present and future business operations of each member of the *amici* group. Its essential provisions are as follows:[6]

> "(b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand,

[4] Members of the *amici* group currently marketing petroleum products in Maryland through retail service stations include:

Cities Service Oil Company: 60 retail service stations—34 company operated, 26 dealer operated.

Getty Refining and Marketing Company: 92 retail service stations—all dealer operated as of May 15, 1977.

The Standard Oil Company (of Ohio): BP Oil Inc., a subsidiary, has 72 retail service stations, 61 of which are company-operated, 11 of which are dealer operated. BP Oil Inc. also sells to 32 wholesale distributors, and 20 other retailers.

Sunmark Industries, A Division of Sun Oil Company of Pennsylvania: 264 retail service stations, 9 of which are company-operated, 255 of which are dealer operated. Sunmark expanded the number of company-operated stations in 1975-1976.

Tenneco Oil Company does not now have any retail service station outlets nor any branded operations in Maryland. Tenneco does sell petroleum products to 61 wholesalers in Maryland.

See also Pre-Trial Order, Circuit Court for Anne Arundel County, October, 1975, Tables A and B, at pp. 11-13 for 1974 data on petroleum marketing in Maryland.

[5] Companies which do not presently market petroleum products in Maryland include: Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (a subsidiary, Digas Company, operates one retail outlet in Baltimore under an exclusive contract with Memco Stores).

[6] Md. Ann. Code art. 56, § 157E (1972 Repl. Vol., 1976 Cum. Supp.).

secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

"(c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

"(d) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

* * *

"(f) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis and shall not discriminate among the dealers in their allotments."

Paragraphs (b) and (c) of the Maryland statute prohibit petroleum producers and refiners from opening or continuing to own or operate retail service stations operated by company personnel. These provisions of the statute will force many members of the *amici* group to divest themselves of existing company-operated retail service station outlets for their petroleum products, and will prevent them from open-

ing new retail outlets.[7] Thus, an important avenue for the distribution of petroleum products will be eliminated. Other members of the *amici* group, not currently engaged in retail marketing of petroleum products in Maryland, will be prevented from entering and competing in the Maryland market because the Maryland statute prohibits company-operated retail service stations, which are the only effective means of competition in a field dominated by brand names and established consumer loyalties.[8] No member of the *amici* group can maintain or establish company-operated retail service station outlets to market petroleum products in Maryland as long as it has a petroleum production or refining capacity.

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[7] Members of the *amici* group which market petroleum products in Maryland through company-operated retail service stations and which would be subject to the divestiture provisions of the Maryland statute include: Cities Service Oil Company, The Standard Oil Company (of Ohio) (through a subsidiary, BP Oil Inc.), and Sunmark Industries, A Division of Sun Oil Company of Pennsylvania.

Tenneco Oil Company sells to 61 wholesale customers in Maryland, but has no retail outlets in Maryland. Thus, Tenneco would not be subject to the divestiture provisions of the Maryland statute, but its ability to sell to wholesalers in Maryland might be affected by the uniform allocation and pricing provisions of the statute, which apply to the wholesalers to whom Tenneco sells petroleum products.

[8] Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (one outlet of a subsidiary is operated under an exclusive contract with Memco Stores). One member of the *amici* group, Koch Refining Company, has only company-operated retail outlets for its products, and has never had any dealer-operated retail outlets. The Maryland statute, upheld by the court below, entirely precludes Koch from entering the Maryland market.

Paragraph (f) of the Maryland statute requires any member of the *amici* group which enters or remains in the Maryland petroleum retail market to allocate petroleum products uniformly to all retail service station dealers. In the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751 *et seq.*, Congress established its own broad plan for allocating petroleum resources. Paragraph (d) of the Maryland statute requires any member of the *amici* group which enters or remains in the Maryland petroleum retail market to grant voluntary price allowances uniformly to all retail service station dealers throughout the state. Section 2(b) of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b), requires price discriminations to be extended only on a non-uniform and geographically limited basis. Thus, the Maryland statute requires any member of the *amici* group conducting business in Maryland to operate in ways new and different from the requirements of these two important federal statutes.

The Maryland statute, upheld by the court below, will have profound effects on the nature, scope, distribution and pricing methods of the present and future business operations in Maryland of each member of the *amici* group. Other states have adopted or are considering similar or identical legislation.[9] Therefore, the decision of the court below, because of its potential precedential value, could have significant impact on the business of the *amici* group in some thirty-four jurisdictions other than Maryland. For these reasons, this brief of *amici curiae* is being filed with the consent of the parties to urge this Court to vacate the decision of

[9] *See* notes 10 and 11, at page 10, *infra*.

the court below and to declare the Maryland statute at issue in this case invalid.

The *amici* have obtained written consent of all the parties below to the filing of this brief as *amici curiae* pursuant to Rule 42(1) of the Rules of this Court, and have filed these consents simultaneously with this brief.

SUMMARY OF ARGUMENT

The Maryland statute upheld by the court below violates the Commerce Clause of the United States Constitution. It conflicts with and is preempted by the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* It conflicts with and is preempted by Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b).

By forbidding the operation or ownership of company-operated retail service stations by petroleum producers, refiners or wholesalers, the statute eliminates an important avenue for the distribution of petroleum products, thus placing an impermissible burden on interstate commerce. The local interest which it was designed to serve is not legitimate, and neither it nor the articulated local ends outweighs the burden on interstate commerce imposed by the statute. Moreover, the statute, and similar legislation adopted or being considered in some thirty-four states other than Maryland, intrudes into an area in which there is a need for uniform national regulation. This statute therefore conflicts with the power granted by the Constitution to the Congress to regulate interstate commerce.

The federal Emergency Petroleum Allocation Act establishes a comprehensive and complex federal pro-

gram to regulate the allocation of petroleum products. Paragraph (f) of the Maryland statute requires the uniform apportionment of petroleum products to all retail service station dealers during times of shortage. The court below concluded that there was no direct conflict between the two, and therefore no preemption of the Maryland statute. This determination is inconsistent with the proper construction of the Emergency Petroleum Allocation Act, § 755(b), and contravenes the policy expressed by Congress in that Act. It also would interpose differing administration in an area where national uniformity is essential to the effectiveness of the Emergency Petroleum Allocation Act. The Maryland statute not only intrudes upon the area regulated by the federal statute but also conflicts with it. It is therefore preempted.

Paragraph (d) of the Maryland statute conflicts with Section 2(b) of the Robinson-Patman Act. The court below concluded that there was no conflict between the two statutes because Section 2(b) did not apply in the circumstances regulated by the Maryland statute. It reached this erroneous conclusion by improperly relying on one—and the minority—interpretation by a lower federal court of the circumstances in which Section 2(b) is available as a defense to sellers making price differentials among buyers. Moreover, even if the interpretation of Section 2(b) relied on by the court below were correct, paragraph (d) still conflicts with the Robinson-Patman Act in two important ways: (1) it requires uniform, state-wide price differentials while Section 2(b) permits only non-uniform, geographically limited differentials; and (2) it prohibits price differentials without regard to injury to competition while Section 2(a) of the Robinson-

Patman Act prohibits price differentials only if there is injury to competition.

ARGUMENT

I. THE MARYLAND ACT IS INVALID UNDER THE COMMERCE CLAUSE.

The Constitution provides in Article I, section 8, clause 3, that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

Paragraphs (b), (c), and (d) of the Maryland statute are invalid under the commerce clause because they:

(1) discriminate against interstate commerce,

(2) unreasonably burden interstate commerce, and

(3) undertake to regulate interstate commerce in an area in which there is a need for national uniformity of regulation.

A. The Maryland Act Discriminates Against Interstate Commerce.

Producers and refiners distribute petroleum products to the consuming public through both company-operated and independently-run retail service stations. Paragraphs (b) and (c) of the Maryland Act eliminate one of these distribution methods, the company-operated retail service station. If allowed to stand, the Act will alter radically the structure of the petroleum industry, which has, until now, depended on both avenues of distribution. Moreover, the problem is magnified by the enactment of similar statutes in several

states,[10] and the extensive consideration being given related measures in 31 state legislatures.[11]

The Act has the effect of excluding from the Maryland retail service station market all interstate petroleum producers and refiners, thus in essence preserving that market for Maryland's own citizens, the independent retail service station dealers. Such a clear discrimination against interstate commerce is constitutionally impermissible. *Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977; *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951).

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[10] Delaware and the District of Columbia have adopted statutes which prohibit petroleum producers or refiners from operating retail stations and require prices and allowances to be uniform. Del. Code tit. 6, §§ 2905-2906 (Cum. Supp. 1976); D. C. Law 1-123 (April 7, 1977). The Delaware statute was recently upheld. *Atlantic Richfield Co.* v. *Tribbitt*, Case Nos. 4692, 4774 (Ct. of Chancery, New Castle County, Delaware, August 25, 1977). Florida enacted a law limiting the percentage of retail stations which could be company operated. Fla. Stat. Ann. § 526.151 (Supp. 1976) (held unconstitutional under the Florida Constitution in *Exxon Corp.* v. *Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Florida, January 23, 1975)). California and Rhode Island have adopted statutes which require price allowances to be uniform. Cal. Bus. & Prof. Code § 21200 (Deering) (held unconstitutional under the federal Constitution in *Shell Oil Co.* v. *Younger*, 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed*, No. 76-2784 (9th Cir. Aug. 13, 1976)); Rhode Island, R.I. Gen. Laws § 5-55-5 (Supp. 1976).

[11] Legislatures in the following states have been or are considering related measures: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. California and Rhode Island, which have adopted statutes which require uniform price allowances, *see* note 10, *supra*, also have been considering legislation which requires divestiture of company-operated retail service stations.

The Maryland Court of Appeals dismissed the contention that the Act discriminates against interstate commerce on the ground that the Act is equally applicable to all producers and refiners, and would equally exclude Maryland refiners from the market—if there were any. (App. A, p. 19a.) This approach ignores the principle that a discrimination may exist even though the statute is neutral on its face. *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951); *Nippert* v. *City of Richmond*, 327 U.S. 416, 431 (1946). This Court recognized long ago that the commerce clause forbids discrimination "whether forthright or ingenious." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455 (1940). Any other view would mean that the commerce clause had no effect "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951).

Thus the court below stopped short of the relevant inquiry: whether the Act discriminates against interstate commerce *in practical effect*. *Id.* This Court has held that in "erecting an economic barrier protecting a major local industry against competition from without the State," a law "plainly discriminates against interstate commerce." *Id.* Since there are no Maryland producers or refiners, that is precisely what this law does. Moreover, this Court has recently noted that where—as here [12]—passage of the discriminatory law was actively sought by the local industry which the law effectively protects, closer scrutiny of the possibility that "its discriminatory impact on interstate commerce was not an unintended byproduct" is appro-

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[12] *See* App. A, p. 9a.

priate. *Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977.

B. The Maryland Act Burdens Interstate Commerce.

The Maryland Act imposes a heavy burden on interstate commerce. It forces interstate producers and refiners to discontinue retail operations in Maryland. This in turn may impede both the flow of gasoline and the flow of capital between other states and Maryland. The statute will also preclude oil companies not now engaged in Maryland activities from entering the Maryland market unless they are willing to forego the economically attractive option of operating retail outlets.[13] Those partially integrated private brand marketers which presently play an active competitive role in the Maryland market and cannot afford to retail gasoline except through company-operated outlets, will be driven out of the state. Other private brand marketers which are planning to integrate backwards into refining in order to strengthen their competitive posture, will be barred from doing so.

This disruption of interstate commerce failed to move the Maryland Court of Appeals, which took the erroneous position that the commerce clause applies only where a law interrupts the actual flow of goods between states. This is a much too narrow application

[13] This Court has recognized the important role played by such potential competitors. For example, it has prohibited mergers where one of the parties might have entered the other party's market on its own, because the mere presence of the potential competitor waiting in the wings has a positive effect on competition. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 581 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964).

of the clause, as this Court has consistently recognized. In *Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977, increasing the costs of doing business for the out-of-state marketer and stripping away the competitive and economic advantages which the out-of-state marketer had earned for itself, were held to be impermissible burdens. *See also Nippert* v. *City of Richmond*, 327 U.S. 416 (1946) (tax which gave competitive advantage to local merchants over out-of-state competitors held impermissible burden). The fact that oil companies could still sell their products in Maryland (to independent dealers or jobbers) is therefore irrelevant.

The court below also asserted that gasoline retailing is "a wholly intrastate activity." (App. A, p. 18a.) Here again the court's conclusion is too facile; it ignores the standards established by this Court. In determining whether an activity involves interstate commerce, this Court considers such factors as whether it exerts a substantial economic effect on interstate commerce, whether the products sold move across state lines, and whether the purchasers are involved in interstate activities. *Perez* v. *United States*, 402 U.S. 146 (1971); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Nippert* v. *City of Richmond*, 327 U.S. 416, 424 (1946); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Measured by these criteria, gasoline retailing is unquestionably an interstate activity.[14] The conclusion of the court below is also contrary to this Court's holding that the sale of gasoline is an interstate activity subject to the federal antitrust laws. *FTC* v. *Sun Oil Co.*, 371 U.S.

[14] Surely, for example, the retailers are subject to the provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1970), and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1970).

505 (1963); *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

C. The Maryland Act's Discrimination Against and Burden on Interstate Commerce Cannot Be Justified on the Basis of Local Benefits.

Once a state statute has been found to discriminate against or burden interstate commerce, the burden must be considered in the light of the local interests the statute was designed to serve and the means available to promote them. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). If the local interests at stake are illegitimate, insubstantial compared to the burden, or not in fact served by the statute, or if less restrictive alternatives exist, the statute will not be sustained. *See Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

1. *The Local Interest Is Illegitimate.*

The avowed purpose of the Act was to preserve competition in gasoline retailing. (App. A, p. 19a.) However, the history of the legislation and its support by local independent dealers (App. A, p. 9a) led the trial court to conclude that the real purpose of the Act was to protect local dealers from out-of-state competition (App. D, p. 131a); and that is unquestionably its effect. *Cf. Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928) (a court is not bound by legislative declarations of purpose). The protection of local economic interests is *not* a legitimate local concern. Economic protectionism is precisely what the commerce clause was designed to proscribe. *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949).

2. *The Local Interests Are Outweighed By the Burden on Interstate Commerce.*

Even if this Court accepts the state's assertion of appropriate local interests, these interests are insubstantial compared to the burden on interstate commerce, and are not in fact promoted by the terms of the Act. The local interests on which the state relies are the need for fair allocation of gasoline between a company's self-operated stations and its dealer-operated ones in time of shortage, and the need to halt the trend toward more company-operated stations. (App. A, pp. 14a-15a, 19a.) Neither provides any justification for paragraph (c) of the Act, which calls for divestiture of existing company-operated stations. The need for fair allocation is fully served by paragraph (f), and any valid need to prevent an increase in company-operated stations is fully served by paragraph (b). Moreover, paragraph (f) was not needed to assure fair allocation because the federal Emergency Petroleum Allocation Act already provides a scheme for mandatory fair allocation in time of shortage.[15] 15 U.S.C. § 751 *et seq.* (Supp. V 1975); 10 C.F.R. §§ 210-211 (1977). Finally, neither purpose justifies including under the Act the private brand marketers which have *only* company-operated outlets: since they have no dealer-operated stations, it is *impossible* for these marketers to disfavor their dealer-operated stations in allocation or to convert them to company operation.

To the extent that the purpose of the Act may be said to be the general promotion of competition, here too the statute fails to meet constitutional require-

[15] *Amici* contend below that paragraph (f) is preempted by the EPAA. *See* pages 20-31, *infra*.

ments. By excluding from the Maryland market the partially integrated private brands, the Act substantially reduces competition—not only because it leaves fewer sellers in the market but also because the private brands are a principal source of price competition. The court below conceded this and further noted that "[a]s of now there has been no evidence by which to judge the effects of these statutes and predictions as to the effects of the Act are at best speculative." (App. A, pp. 15a-16a.) The state has thus failed to sustain its burden to justify the Act by demonstrating that it will promote its purported goals. *See Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977.

3. *There Are Less Restrictive Alternatives.*

Again assuming *arguendo* that the Act was designed to promote the state's interests in fair allocation and preserving dealer-operated stations, those interests could be promoted as well with a lesser impact on interstate commerce. As noted above, the Emergency Petroleum Allocation Act fully serves the state's interest in fair allocation. Maryland's interest in protecting independent dealers from improperly being squeezed out in favor of company-operated stations is adequately served by the federal and Maryland antitrust laws, Md. Com. Law Code Ann. §§ 11-201 *et seq.* and 11-401 *et seq.* (1975); the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1970); the Maryland Gasoline Products Marketing Act, Md. Com. Law Code Ann. § 11-301 *et seq.* (1975); and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). The latter has recently been applied to alleged unfair provisions in retail service station transactions. *Phillips Petroleum Co.*, 84 F.T.C. 1666 (1974) (consent order for settlement purposes only with no admission or finding of violation); *Standard Oil Co. (Ohio)*, Dkt. 8910, CCH Trade Reg. Rep. ¶ 20,134 (proposed complaint, 1972), ¶ 20,208 (complaint issued, 1973), ¶ 21,329 (consent order to cease and desist, 1977).

D. The Maryland Act Regulates Interstate Commerce in an Area in Which There is a Need for National Uniformity of Regulation.

Any state statute which affects interstate commerce must pass a third test. In addition to being non-discriminatory and reasonably adapted to the local end sought, it must concern itself only with the local aspects of interstate activities and not intrude into areas where there is a need for national uniformity of regulation.

First, a statute must confine itself to the local aspects of interstate activities. No state has the power to regulate commerce beyond its borders. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 773, 775 (1945). Paragraph (d) of the Act exceeds these limits by effectively tampering with gasoline pricing outside Maryland. Under paragraph (d), a company cannot extend a price allowance to one station in Maryland without extending it to all stations in Maryland. In the absence of a statutory defense, *see, e.g.*, 15 U.S.C. § 13(b), the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), forbids a company to extend a price allowance to one station without extending it to competitors in the same market area.[18]

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[18] A market area may spill across state boundaries. *See, e.g., Ingram* v. *Phillips Petroleum Co.*, 259 F.Supp. 176, 182 (D.N.M. 1966).

Amici contend below that paragraph (d) is preempted by the Robinson-Patman Act. *See* pages 32-41, *infra*.

If a company were to decide to extend a price allowance to one station in the eastern part of the District of Columbia, the Robinson-Patman Act might well require the company to extend the allowance to competing stations in Prince George's County, Maryland. However, if the allowance were extended to even one Prince George's County service station, paragraph (d) would require that it be extended to every station in the entire state of Maryland. At that point, the Robinson-Patman Act might well require that the price allowance be extended to dealers in Wilmington, Delaware, or other border towns deemed to be in the same market area as any Maryland station. Thus, the Maryland Act impinges on and greatly inhibits a company's pricing practices in the District of Columbia and all the states that border Maryland."

Second, "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 444 (1960). "[E]ver since *Gibbons* v. *Ogden* . . . the states have not been deemed to have authority . . . to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 (1945). Maryland has attempted to restructure the petroleum

[17] Paragraph (d) also burdens interstate commerce in that it requires the granting of price allowances to all stations within Maryland but not to those outside the state. In reporting on the Robinson-Patman Act, the Congress found: "When granted to those within the State and denied to those beyond, [price discriminations] involve . . . a directly resulting burden upon interstate commerce with the latter." S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936). *See also* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

industry. This Court has always been less receptive to such economic legislation by the states than to state legislation which bears on the health or safety of its citizens. *See, e.g., H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949). The economic management of the petroleum industry is clearly a matter of national concern which should be addressed by Congress.[18] In fact, it has been. In the federal Emergency Petroleum Allocation Act, Congress responded to the same concern—national in scope—which Maryland has attempted to take into its own hands.[19]

This action is doubly relevant, for the state's power to legislate in areas affecting interstate commerce is a strictly limited one. As this Court said in *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 185 (1938) (emphasis added):

> "[I]t has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation *in the absence of Congressional action* has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

[18] The threat to national uniformity is magnified by the passage of similar laws by several states in addition to Maryland. *See* notes 10 and 11, at page 10, *supra*.

[19] The Congress is also considering legislation which would restructure the petroleum industry. *See, e.g.*, S. 795, 95th Cong., 1st Sess., 123 Cong. Rec. S2974 (daily ed. Feb. 24, 1977); H.R. 3370, 95th Cong., 1st Sess., 123 Cong. Rec. H1074 (daily ed. Feb. 9, 1977); 9 Nat'l J. 170-173 (1977).

See also Morris v. *Duby*, 274 U.S. 135, 143 (1927). Thus the passage of the Emergency Petroleum Allocation Act occupies the field and precludes the operation of the Maryland law.[20]

II. PARAGRAPH (f) OF THE MARYLAND STATUTE IS PREEMPTED BY THE FEDERAL EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, BY VIRTUE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Under This Court's Decisions, Paragraph (f) is Barred by the Supremacy Clause.[21]

In 1973 Congress established a nationwide program for the allocation of scarce petroleum supplies. The Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751 *et seq.*, requires the President to develop, in accordance with detailed guidelines established by Congress, a comprehensive program of mandatory allocation of petroleum products during times of shortage. The President delegated his authority to the Administrator of the Federal Energy Administration, who adopted comprehensive and detailed regulations. *See* 10 C.F.R. §§ 211.1-211.225 (1977).

Thereafter, Maryland passed the present statute which also deals with the allocation of gasoline and petroleum-based fuel. It provides in paragraph (f):

> "Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments."

[20] *See also Leisy* v. *Hardin*, 135 U.S. 100, 108-109 (1890).

[21] U.S. Const. Art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

1. *Congress Has Occupied the Field.*

This Court has often held that state regulation is preempted if the scheme of federal regulation of the same subject is pervasive and comprehensive. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Campbell* v. *Hussey*, 368 U.S. 297 (1961). Where Congress has occupied the field, the states are barred from imposing any additional regulation, even if it appears to supplement rather than conflict with the federal program: in this situation "complementary state regulation is as fatal as state regulations which conflict with the federal scheme." *Campbell* v. *Hussey*, 368 U.S. 297, 302 (1961); *accord, De Canas* v. *Bica*, 424 U.S. 351, 356 (1976); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

The EPAA and the regulations promulgated under it clearly occupy the entire area relating to the allocation of petroleum products. The regulations set forth distinct allocation formulae for each type of petroleum-based fuel and each type of consumer, with a special section dealing solely with the allocation of gasoline to retail service station dealers. 10 C.F.R. § 211.106 (1977). The federal program is the result of a sensitive balancing of competing political, economic, social and regional interests. It sets forth nine objectives which are to be accommodated "to the maximum extent practicable." 15 U.S.C. § 753(b)(1) (Supp. V 1975). Both the Congress and the courts have recognized the exceedingly complex and finely-tuned nature of this undertaking. *See, e.g.*, H.R. Rep. No. 628, 93rd Cong., 1st Sess. 12 (1973); *Air Transport Ass'n of America* v. *FEO*, 520 F.2d 1339, 1342 (Emer. Ct. App. 1975); *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351, 359 (Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975).

These characteristics of the EPAA are precisely the kind which this Court has found to be evidence of a congressional intent to preempt state legislation. For example, in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 632, 634 (1973), the Court noted that Congress had set forth "particularized standards" for regulation of aircraft noise, and that the system of federal regulation was intricate. The Court stated:

> "The Federal Aviation Act requires a delicate balance between safety and efficiency . . . and the protection of persons on the ground . . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."

Id. at 638-39.

In evaluating the preemptive intent of Congress, this Court has also given great weight to the creation of an agency to administer the federal scheme. In discussing preemption by the National Labor Relations Act, the Court has stated:

> "[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . ."

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236, 242 (1959); *accord, Garner* v. *Teamsters Union*, 346 U.S. 485, 490-91 (1953). Less than a week after the passage of the EPAA, the President created the Federal Energy Office and transferred to it all his

authority under the EPAA. Exec. Order No. 11748, 3 C.F.R. 822 (1973). That office was soon replaced by the Federal Energy Administration (FEA), one of whose express purposes was to insure fair distribution of petroleum fuels, 15 U.S.C. § 761 (Supp. V 1975), and the President promptly delegated all of his powers under the EPAA to it. Exec. Order No. 11790, 3 C.F.R. 882 (1974).

The FEA was, in turn, recently replaced by the federal Department of Energy, which absorbed all of the functions of the FEA. Department of Energy Organization Act, Pub. L. No. 95-91, § 301(a), 91 Stat. 565 (1977). In creating a Cabinet-level energy agency, Congress recognized the urgent need for "the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs . . ." Pub. L. No. 95-91, *supra*, § 101(4).

2. *Paragraph (f) Stands As An Obstacle to the Accomplishment of the Full Purposes of Congress.*

A state law is equally preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *accord, Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977). This is a broader inquiry than the question, discussed below,[22] whether anything in the state law conflicts with the terms of the federal law. Here the Court is "concerned with delimiting areas of *potential* conflict; potential conflict of rules of law, of remedy, and of administration." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959) (emphasis added). In a holding which clearly

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[22] *See* page 31, *infra*.

applies to Maryland's intrusion into petroleum allocation, the Court said:

> "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Id. at 244; *accord, Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 231-32 (1947).

This Court has also found preemption where there was a potential conflict between the federal and state procedural schemes. "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-91 (1953); *accord, San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959).

Even the Maryland Court of Appeals recognized the potentiality of conflict between the execution of paragraph (f) and the regulations promulgated under the EPAA.[23] (App. A, p. 32a.) In upholding paragraph (f), that court considered it sufficient that the state law *could conceivably* be administered in a way that would *not* conflict with the EPAA. But in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 231-32 (1947), this Court rejected precisely that argument. There the state urged the Court to allow the state regulation to proceed and

[23] That potentiality is enhanced by the extremely vague mandate of paragraph (f), which sets virtually no limits on the discretion of Maryland's Comptroller of the Treasury, in whom power to administer the Act is vested. Md. Ann. Code art. 56, § 157B(a) (1972 Repl. Vol., 1976 Cum. Supp.).

to wait and see if any of it actually conflicted with the federal scheme. The Court said that "at first blush" the argument "has great plausibility," but it rejected it because "such a construction would thwart the federal policy which Congress adopted" in the federal law. *Id.* at 232. There, as here, the very existence of a "dual system of regulation" was incompatible with the federal scheme, even if no actual conflict arose. *Id.* at 234.

The need for a single federal system of petroleum allocation is patent. Petroleum shortages are a nationwide problem that can be ameliorated only on a national basis. The sensitive accommodation of policy considerations mandated by the EPAA and discussed above cannot be accomplished if each state is allowed to impose additional and potentially inconsistent regulation. It should not be overlooked that to approve Maryland's intrusion into the field would be to approve not just one small digression, but the creation of fifty separate and uncoordinated allocation programs.[24] Congress clearly expressed its intention to preclude that result by providing for a comprehensive and exceedingly intricate federal program. *See* discussion *supra,* pages 20-23. It also stated as one of its findings that:

> "such hardships and dislocations jeopardize *the normal flow of commerce* and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action *by the Executive branch of Government.*"

15 U.S.C. § 751(a)(3) (emphasis added). Similarly, the House Committee reporting the bill cited "the need

[24] This threat is already becoming reality. *See* notes 10 and 11, at page 10, *supra.*

for *Federal intervention* in the market to order mandatory allocation of certain fuels . . ." H.R. Rep. No. 531, 93d Cong., 1st Sess. 6 (1973) (emphasis added).

In addition, Congress included in the EPAA an express statement of its intention to preempt the field. (Ironically, it is that very statement on which the Maryland Court of Appeals relied in upholding the state law. *See* pages 26-28, *infra.*) Section 755(b) of the EPAA states:

> "The regulation under Section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any state or local government if such provision is in conflict with such regulation or any such order."

That language confirms that state regulation of petroleum allocation would frustrate the purposes and objectives of Congress.[25]

B. The Language of § 755(b) Does Not Make Preemption Inapplicable.

1. *The Court of Appeals Incorrectly Construed § 755(b).*

The Maryland Court of Appeals noted that the terms of § 755(b) preempted any provision of any state

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[25] It is of no avail that the underlying purposes of the state law and the EPAA are similar. As this Court stated in *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963):

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

program "if such provision is in conflict with" the EPAA, and concluded that the section was intended to narrow the normal scope of preemption so as to bar only state programs which actually conflict with federal law. (App. A, p. 30a.) It then interpreted "actual conflict" to cover only patently contradictory provisions and, finding none, upheld the Act.

The court's construction of § 755(b) is erroneous for several reasons. First, it makes the section a mere restatement of the supremacy clause and, thus, quite without effect. Of course, an important provision in a carefully drafted statute should not be construed in a way that renders it superfluous. 2A Sutherland, Statutes and Statutory Construction § 46.06 (4th ed. C. Sands 1973).

Second, the court's construction transforms an affirmatively phrased preemption provision into an expression of intent not to preempt. This can hardly have been the intention of Congress. When Congress has intended non-preemption in other statutes, it has said so in straightforward terms. *See, e.g.,* 7 U.S.C. § 2051 (Supp. V 1975), *construed in De Canas* v. *Bica,* 424 U.S. 351, 362 (1976) ("provisions contained herein are intended to supplement State action and compliance with this chapter shall not excuse anyone from compliance with appropriate State law and regulation"); 15 U.S.C. § 78bb(a) (Supp. V 1975), *construed in Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 138 n. 16 (1973) (federal rights and remedies "shall be in addition to any and all other rights and remedies that may exist at law or in equity"; "[n]othing in this chapter shall affect the jurisdiction of the securities commission . . . of any

State . . . insofar as it does not conflict with the provisions of" the federal act).

Third, in other parts of the EPAA, Congress spelled out a limited role for the states to play in the allocation process. 15 U.S.C. § 754(b) (Supp. V 1975); 10 C.F.R. §§ 211.15, 211.17 (1977). The Court of Appeals' construction of § 755(b) is irreconcilable with these provisions, since they narrowly circumscribe the state role and emphasize federal supervision and coordination of it. *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 234 n. 12 (1947) (one factor in finding preemptive intent was presence in federal statute of provisions specifically subjecting *certain* aspects of subject to state law).

Fourth, the intention to preempt state regulation—already evidenced in the legislative history, quoted *supra* at pages 25-26, and the terms of the EPAA—is further expressed in the Federal Energy Administration Act, 15 U.S.C. § 761 (Supp. V 1975). Among the purposes of the agency created, in part, to administer the EPAA, are listed: "to insure fair and efficient distribution" of fuel and "to assure a coordinated and effective approach to overcoming energy shortages. . ."[26] Again, it would be anomalous to find, as the court below did, a congressional intention in the EPAA to allow fifty *un*coordinated and *un*supervised state programs.

Fifth, as noted *supra* at pages 24-25, the theory advanced by the Court of Appeals that § 755(b) prohibits only actual conflicts if and when they arise, was expressly rejected in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 231-32 (1947).

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[26] *See also* statement of purposes of newly created Department of Energy, discussed at page 23, *supra*.

2. *Even If the Maryland Court's Construction of § 755(b) Were Correct, Paragraph (f) Is Nevertheless Preempted.*

Most importantly, even if the court below was correct that § 755(b) provides for preemption only in cases of actual conflict, it was wrong in ending the inquiry there. The court assumed, without citing any support for its assumption, that if § 755(b) expressed a limited preemptive intent, that was dispositive, and ordinary preemption principles did not apply. As a result, the court did not even reach the question "whether the existence of a comprehensive system of federal regulation necessarily precludes state regulation . . ." (App. A, p. 30a.)

The assumption made by the Court of Appeals reflects a fundamental misunderstanding of the supremacy clause. As one authority has written: "Pre-emption can never be the product of statutory construction alone, since the Court and only the Court can make the final judgment of incompatibility required by the supremacy clause." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction,* 12 Stan. L. Rev. 208 (1959), *quoted in* G. Gunther, Cases and Materials on Constitutional Law 359 (9th ed. 1975). This Court recently recognized that principle in a case which closely parallels the instant one. In *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), the Court discussed a preemption provision which barred all state laws "which are less stringent than or require information different from the requirements of" the federal law. The Court found that the state law in question did not require different information and was, therefore, not preempted by the terms of the federal

provision. Nevertheless, it went on to say (430 U.S. at 540-41):

> "That holding does not, however, resolve this case, for *we still must determine* whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [Emphasis added.]

The Court then concluded that the state law did interfere with the federal purposes and accordingly held the state law invalid.

Similarly, in *De Canas* v. *Bica,* 424 U.S. 351, 357 n. 5 (1976), the Court noted: "Of course, even absent such a manifestation of congressional intent to 'occupy the field', the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties." The Court found that the terms of the federal law in question did not totally preempt the field. Nevertheless, it continued:

> "There remains the question whether, although the INA [Immigration and Naturalization Act] contemplates some room for state legislation, [the state law] is *nevertheless unconstitutional* because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA."

Id. at 363 (emphasis added).

Thus, it is clear that, even as construed by the Maryland Court of Appeals, the language of the EPAA preemption provision did not obviate analysis (1) of the comprehensiveness of the federal scheme and (2) of potential interference by the state law with the purposes of the EPAA. The state court erred in omitting these inquiries. As shown above, these basic principles of preemption require the conclusion that paragraph (f) is preempted by the EPAA, and § 755(b)—even as incorrectly construed by the court below—does not support a contrary result.

3. *There Are Actual Conflicts Between Paragraph (f) and the EPAA.*

Finally, even assuming that the court below was correct that the EPAA preempts only those state allocation programs which actually conflict with the federal scheme, it erred in upholding the state statute. There are clear actual conflicts between the two programs. For example, paragraph (f) calls for "uniform" apportionment of fuels, while the EPAA regulations set forth complicated formulae dependent on base period volume and allocation fractions, which are anything but uniform. 10 C.F.R. §§ 211.10, 211.106 (1977). Those formulae are, in turn, founded on the accommodation of nine overlapping policy considerations. 15 U.S.C. § 753(b)(1). Paragraph (f) allows for no distinction between gasoline and "special fuels". In contrast, the EPAA sets forth allocation regulations for motor gasoline, 10 C.F.R. § 211.107(b), but exempts diesel fuel, 41 Fed. Reg. 24518 (1976).

The above conflicts appear on the face of the Maryland Act. It is likely that even more actual conflicts would arise as soon as the Comptroller of Maryland began to implement the almost unlimited discretion committed to him by paragraph (f). The fact that the nature of these conflicts is unknown and unknowable at the present time underscores rather than diminishes the applicability of the supremacy clause.

III. THE MARYLAND COURT OF APPEALS ERRED IN ITS DETERMINATION OF THE SCOPE OF SECTION 2(b) OF THE ROBINSON-PATMAN ACT AND OF THE COMPATIBILITY OF THAT ACT WITH PARAGRAPH (d) OF THE MARYLAND STATUTE.

A. Section 2(b) of the Robinson-Patman Act was Incorrectly Interpreted by the Court Below.

Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), provides that a seller can rebut a *prima facie* case of unlawful price discrimination among purchasers in violation of Section 2(a) of the Act [27] by showing that "his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . ." This Court has held that this Section 2(b) "meeting competition" defense is an absolute defense against liability under Section 2(a), irrespective of any adverse effects on competition engendered by such price discrimination. *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 241, 246-247 (1951).

Paragraph (d) of the Maryland statute provides:

> "Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

[27] Section 2(a) provides, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." 15 U.S.C. § 13(a).

"Voluntary allowances" was construed by the court below to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing dealer." (App. A, p. 35a.) Paragraph (d) makes voluntary allowances or price discriminations a state-wide matter.

In reaching its conclusion that there was no conflict between Paragraph (d) and Section 2(b) of the Robinson-Patman Act (App. A, p. 40a), the Maryland Court of Appeals relied on one of two conflicting views in lower federal courts relating to the circumstances in which the Section 2(b) "meeting competition" defense is available. The case relied on is *Enterprise Industries* v. *Texas Co.*, 136 F. Supp. 420, 421 (D. Conn. 1955), *reversed on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). (App. A, pp. 37a, 39a-40a.) [28] But that case is explicitly contradicted by a decision of the United States Court of Appeals for the Seventh Circuit, *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1175 (7th Cir. 1972),[29] and implicitly contradicted by

[28] The federal district court held that, under Section 2(b), a seller could offer a buyer ("buyer 1") a lower price only if that specific buyer ("buyer 1") had been offered an equally low price by a competitor of the seller. *Enterprise Industries* v. *Texas Co.*, *supra*, 136 F. Supp. at 421.

[29] The Seventh Circuit held, in an opinion written by the late Mr. Justice Clark, sitting by designation, and concurred in by now Mr. Justice Stevens, that under Section 2(b), a seller could offer

the decisions of two other appellate courts and one district court.[30] It is also contradicted by the Federal Trade Commission's and the Department of Justice's interpretations of Section 2(b).[31]

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a buyer ("buyer 1") a lower price to meet the equally low price offered by a competitor of the seller to *its* buyer ("buyer 2"). The Seventh Circuit did not, unlike *Enterprise*, require that there be identity of the buyer to which a lower price had been extended, nor that the buyer to which the lower price had been extended be a buyer of the seller desiring to make a price differential. In reaching this conclusion, the Seventh Circuit was quite explicit. It gave this example of the circumstance in which the Section 2(b) defense was available:

> "The Section 2(b) defense is available if the lower price granted by American to its dealer 'X' is made to meet an equally low price offered by a competitor of American to a competitor of 'X'." *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra,* 466 F.2d at 1175 n.8.

[30] *See Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 997-998 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) (Section 2(b) defense available when petroleum supplier lowers price and second supplier also lowers price to prevent losing retail customer because competition in prices existed and suppliers were at same functional level); *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973) (dictum that Section 2(b) defense was not foreclosed when competing petroleum supplier reduces price to retail dealer). *See also Bunty* v. *Shell Oil Co.*, 1972 Trade Cases (CCH) ¶ 74,252 (D. Nev. 1972) (price differences offered competitive dealers in the same area resulted from good faith effort to meet prices offered by Shell's competitors to their dealers).

[31] *See* pages 35-36, *infra.* Appellees slight the statutory interpretations of Section 2(b) by these two agencies by calling them "merely variant 'statements of policy'." Motion to Dismiss or Affirm, p. 19. These interpretations are the considered constructions of an important federal statute by two independent entities, and were evolved over a period of time. They cannot fairly be characterized as "ephemeral policy statements," nor as in conflict with the legislative history of the Robinson-Patman Act or this Court's interpretations of the Act. *Id.*

Under these circumstances, the Maryland Court of Appeals erred in construing Section 2(b) in accord with *Enterprise Industries* v. *Texas Co., supra.*

This Court has specifically left open the question of the circumstances in which the Section 2(b) "meeting competition" defense will be available to a seller if the seller's discriminatory price cut to its dealer ("buyer 1") is responsive to a price cut made by a competitor of a seller to its own dealer ("buyer 2"). *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 512 n. 7 and 529 n. 19 (1963). However, the court below was not free to pick and choose among conflicting interpretations of Section 2(b) merely because this Court had not resolved the "difficult and important" question of "the scope and application of the section 2(b) defense." *FTC* v. *Sun Oil Co., supra,* 371 U.S. at 506. The court below should have followed the interpretation of Section 2(b) propounded by the higher and more recent federal court to consider the question, *i.e.*, the decision in *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra.* This sound principle of orderly judicial administration is reinforced by this Court's command that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). The Federal Trade Commission, which once embraced the *Enterprise* doctrine,[32] has abandoned that position, and reached the same conclusion as the Seventh Circuit in *Bargain Car Wash* in regard to the circumstances in

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[32] *Hearings on Gasoline Price War in New Jersey Before a Subcommittee of the Senate Select Committee on Small Business,* 84th Cong., 1st Sess., pt. 2, at 450-451 (1955).

which the Section 2(b) defense is available.[33] The Department of Justice has concurred in the Seventh Circuit's interpretation of Section 2(b) and has affirmed the Federal Trade Commission's position.[34] The court below therefore should have followed the lead of the two agencies charged with enforcement of the Act and of the highest federal court to consider the question.

B. Paragraph (d) of the Maryland Statute Conflicts with the Robinson-Patman Act, and Is Therefore Preempted.

The construction of paragraph (d) by the court below removes the seller's right to invoke the Section 2(b) "meeting competition" defense when the seller reduces a price to buyers to meet the equally low price offered by a competitor of the seller to a buyer.[35] By so

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[33] *The Federal Trade Commission's Report on Anti-competitive Practices in the Marketing of Gasoline*, 3 Trade Reg. Rep. (CCH) ¶ 10,373, at 18,245 (1967): "Consequently, we are of the opinion that a price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer."

[34] *See* Department of Justice, *Report on the Robinson-Patman Act* 94 (1977).

[35] The Court below attempted to mask the conflict between paragraph (d) and Section 2(b) by asserting that "Paragraph D of the State Act encompasses only the situation where temporary price reductions are given to a dealer ["buyer 1"] to meet the lower price of a *competing dealer* ["buyer 2"] and, in our view, § 2(b) of the Federal Act does not extend to that situation." (App. A, p. 40a; emphasis in the original.) Of course, the federal Act did not extend to this situation only because the court below interpreted its scope narrowly, in accordance with the *Enterprise* doctrine. The Attorney General of Maryland similarly seeks to mask this conflict by arguing that the court below did no more than proceed on the basis that as long as a seller's price differential is lawful and offered to any customer, the seller is protected by Section 2(b). Motion to Dismiss or Affirm, p. 16. Clearly, the crux of the question

narrowing the scope of the Section 2(b) defense, the decision below creates liability under paragraph (d) for the seller which has complied with Section 2(a). The scope of Section 2(b) has been considered by this Court to be an essential and integral element of the congressional plan embodied in the Robinson-Patman Act to promote overall price competition and avoid price inflexibility. *See Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

Changing the scope of the Section 2(b) defense interferes with and frustrates this congressional plan by prohibiting price discrimination even in a circumstance where Congress deemed it desirable.[36] Congress has fully expressed its policies in regard to the degree to which the national economy demands price competition and price flexibility in the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7, as amended, and in the Clay-

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is what customer can be offered the differential, and the court below, by following *Enterprise*, eliminated seller's price differentials to one class of customers from the protection of Section 2(b).

[36] This is true notwithstanding the argument of the Attorney General of Maryland that the congressional purpose of Section 2(b) requires a "shared customer" interpretation. Motion to Dismiss or Affirm, p. 17. If this assertion were correct, this Court would not have found it necessary to leave open the question of the availability of the Section 2(b) defense in a non-shared customer situation, *FTC* v. *Sun Oil Co., supra*, 371 U.S. at 512 n. 7 and 529 n. 19. Moreover, there is no support for this assertion in the legislative history. Finally, it is patently incorrect to assert that the absence of a "shared customer" required by the *Enterprise* view, revives the so-called "conduit theory," rejected in *FTC* v. *Sun Oil Co., supra*, at 524. That situation arises only if, as is not true here, there is competition between an integrated entity and a pure retailer, rather than between several integrated entities. *Cf. FTC* v. *Sun Oil Co., supra*, at 512 n. 7, 522.

ton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27, as amended by the Robinson-Patman Act.[37] The Maryland legislature has interposed itself into the area—price competition and protection of small businesses—where Congress has struck a balance of the competing interests.[38] Paragraph (d) disturbs that balance, and interferes with the congressional plan.

Thus, under the construction of Section 2(b) adopted by the court below, paragraph (d) is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is therefore preempted. *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Moreover, even if this Court were to decide that the court below was correct in concluding that the *Enterprise* doctrine properly describes the reach of Section 2(b), paragraph (d) of the Maryland statute still directly conflicts with the Robinson-Patman Act in two important ways.

(1) *Geographic and Overall Extent of Price Differentials.* The Maryland statute requires all voluntary allowances or price differentials to be extended uniformly to all retail service station dealers throughout the state.[39] This Court has not only held that Section 2(b) of the Robinson-Patman Act does not require

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[37] *See also Report of the Attorney General's National Committee to Study the Antitrust Laws* 181 (1955).

[38] *See generally* Department of Justice, *Report on the Robinson-Patman Act* (1977).

[39] "Under Paragraph D if one dealer gets a voluntary allowance or rebate, all Maryland dealers of that brand of product will get the same allowance." Defendants' Memorandum in Support of Their Response and Opposition to Plaintiffs' Motions for Summary Judgment, p. 16.

uniform price reductions,[40] but further that Section 2(b) in fact prohibits uniform price reductions. Section 2(b), this Court has repeatedly stated, permits only price reductions designed to respond to individual competitive situations, *FTC* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746, 753 (1945), or phrased another way, to protect "competitors in individual transactions." *FTC* v. *National Lead Co.,* 352 U.S. 419, 431 (1957).[41]

The conflict between these two provisions is clear.[42] Paragraph (d) of the Maryland statute demands a state-wide, uniform and blanket extension of price differentials which Section 2(b) of the Robinson-Patman

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[40] In *Standard Oil Co.* v. *FTC, supra,* 340 U.S. at 250, this Court stated: "There is, on the other hand, plain language and established practice which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." The *Standard Oil* decision does not require uniform price differentiations to be extended to all customers under § 2(b). *See also Cadigan* v. *Texaco, Inc.,* 492 F.2d 383, 386 (9th Cir. 1974).

[41] In *FTC* v. *Sun Oil Co., supra,* 371 U.S. at 517, the Court said Section 2(b) "permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further" (*quoting* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936)).

See also Hampton v. *Graff Vending Co.,* 478 F.2d 527, 535 (5th Cir.), *cert. denied,* 414 U.S. 859 (1973); *Forster Mfg. Co.* v. *FTC,* 335 F.2d 47 (1st Cir. 1964), *affirmed after remand,* 361 F.2d 340 (1st Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967); *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra,* 466 F.2d at 1176; *Standard Motor Products, Inc.* v. *FTC,* 265 F.2d 674, 677 (2d Cir.), *cert. denied,* 361 U.S. 826 (1959); *Exquisite Form Brassiere, Inc.* v. *FTC,* 360 F.2d 492 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 959 (1966).

[42] The Circuit Court for Anne Arundel County found this conflict so self-evident that it granted a motion made by the present appellants for summary judgment on this issue. (App. C, p. 51a.)

Act prohibits.[43] A state statute which is in direct and actual conflict with a federal statute, *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-143 (1963), or one which makes compliance with it and a federal statute impossible, *Perez* v. *Campbell,* 402 U.S. 637, 652 (1971), cannot stand.[44]

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[43] The Maryland statute also conflicts with the policies of the Sherman Act. *See Report of the Attorney General's National Committee to Study the Antitrust Laws* 181 (1955):

> "For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, 'The right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy.' Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act." (Emphasis in original.)

Cf. Standard Oil Co. v. *FTC, supra,* 340 U.S. at 250, where this Court stated:

> "There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs."

[44] *Cf. Shell Oil Co.* v. *Younger,* 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed,* No. 76-2784 (9th Cir. Aug. 13, 1976), in which the District Court for the Northern District of California invalidated a California statute which permitted a seller to grant a lower price to meet the equally low price offered by a competitor to an individual customer only if the same price reduction was granted to all other purchasers competing with the customer to whom the lower price was granted. In effect, that statute required uniform price reductions as does the Maryland statute. The district court found the statute invalid because it frustrated the congressional purpose embodied in Section 2(b) of the Robinson-Patman Act to foster price competition and because it was in direct, actual conflict with the federal Act.

(2) *Injury to Competition.* Section 2(a) of the Robinson-Patman Act prohibits price differentials only where their effect may be substantially to lessen competition, to tend to create a monopoly, or to injure competition. Paragraph (d) of the Maryland statute prohibits price differentials without regard to effect on or injury to competition. The two acts conflict so directly that the state statute must be preempted. *Perez* v. *Campbell, supra.*

CONCLUSION

The Maryland statute at issue here violates the commerce clause. It intrudes into the area regulated by the EPAA. It also conflicts with both the EPAA and the Robinson-Patman Act. It is thus preempted. The court below erred with respect to all three of these questions. Accordingly, the judgment of the court below should be vacated, and the Maryland statute should be declared invalid.

Respectfully submitted,

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November, 1977

MOTION FILED
NOV 18 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12
77-47, and 77-64

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY and KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., and PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

FILED ON BEHALF OF CHARTER OIL COMPANY, CLARK OIL & REFINING CORPORATION, DERBY REFINING COMPANY, HUDSON OIL COMPANY, INC., ROCK ISLAND REFINING COMPANY, INC., VICKERS PETROLEUM CORPORATION, AND UNITED REFINING COMPANY

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Charter Oil Company, Clark Oil & Refining Corporation, Derby Refining Company, Hudson Oil Company, Inc., Rock Island Refining Company, Inc., Vickers Petroleum Corporation, and United Refining Company hereby move, pursuant to Rule 42(3) of this Court, for leave to file the attached brief as *amici curiae* in support of the appellants. This motion is necessitated by the refusal of the appellee to consent to the filing of this brief.

The interest of the *amici curiae* group is set forth in detail in the brief. To summarize, however, the group is composed of seven small and independent petroleum refiners, firms which are not fully integrated into all four levels of the petroleum industry—crude oil production, refining, transportation, and marketing. The group is primarily engaged in refining and marketing activities and are, therefore, within the class of independent refiner-marketers of whom the trial court found that

> among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be eliminated, the effect of which would be anti-consumer, and that any law which had such an effect would not be in the interest of the public at large. (App. D, at 130a).

Amici historically have operated in their respective marketing areas predominantly through company owned retail outlets. Only through such private brand marketing can they compete at retail with larger, integrated companies. The current and future business operations of every member of the *amici* group are directly, substantially, and adversely affected by the decision of the court below. If the Maryland Motor Fuel Inspection Law is upheld, it will prevent them from expanding and entering the Maryland retail gasoline market. If the statute is approved and adopted in other states, the group will be forced to cease their operations within those states. A witness for the Federal Trade Commission recently confirmed the impact the statute would have upon independent refiners.

> One problem is that several states—Maryland is a prime example—have enacted so-called marketing divestiture laws which do not require the sale of station premises, but do preclude direct operation of outlets

> by the refiners. Pushed through the legislature by the franchised dealers, such legislation has sometimes had the practical effect of eliminating from state markets the *non-branded* dealers. These price-competitive retail outlets have generally been directly operated by employees of independent refiners. By failing to exempt these smaller refiners, who believe they cannot operate efficiently through a franchise system, these laws are apparently eliminating the very price cutters who most benefit consumers.[1]

Although the interests of the *amici* are basically similar to those of the appellants, there are significant differences in their perspectives as to the effects of this statute on both interstate commerce and the retail gasoline market. First, all of these companies are much smaller in both size and resources than the appellants. Since marketing through a dealer system requires enormous resources to develop brand names, these companies are, to an even greater degree than the appellants, dependent upon the use of company owned and operated stations for their retail sales. Second, unlike the appellants, only one of the *amici* group currently sells gasoline at retail in Maryland. The other companies will, in practical effect, be precluded from entering the Maryland market in the future since the statute prohibits them from operating the company owned retail outlets which represent their only feasible means of competition with brand name products.

The resolution of this appeal will also have important and direct consequences for existing, pending, or contemplated legislation in an additional thirty-eight jurisdic-

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[1] Testimony of Owen M. Johnson, Director of the Bureau of Competition of the Federal Trade Commission, appearing before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources (May 25, 1977), at 8-9 (emphasis in the original).

tions.[2] This Court should have the benefit of being presented with a full discussion of the implications of Maryland's attempt to alter the present structure of the retail gasoline market.

For these reasons, it is respectfully requested that the motion of these independent refiners to file a brief *amici curiae* in support of appellants be granted.

Respectfully submitted,

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[2] *See* Testimony of Owen M. Johnson, *supra*, note 1.

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INTEREST OF AMICI CURIAE

The *amici curiae* here are seven petroleum companies: Charter Oil Company, Clark Oil & Refining Corporation, Derby Refining Company, Hudson Oil Company, Inc., Rock Island Refining Company, Inc., Vickers Petroleum Corporation, and United Refining Company. Each of these companies is a separate corporate entity, organized, existing, and operating in the United States.

Amici are all crude deficient refiners of petroleum who market gasoline at retail through, generally unbranded, company owned and operated retail outlets. United Refining and Hudson Oil, for example, have no crude production. Instead, they refine seventy and eighty percent, respectively, foreign oil which they purchase from uncontrolled sources. Further, Rock Island owns less than one percent of the crude oil that it refines, and Clark Oil owns less than two percent.

Amici have few or no branded dealers. Hudson Oil, for example, operates solely by means of company employees, while Vickers Petroleum markets no more than five percent of its gasoline production through such independent dealers. The predominant means by which these companies market gasoline are sales to wholesale customers for resale at retail and sales through unbranded or branded company-operated stations.

Hudson Oil is currently operating within the state of Maryland. All seven companies which constitute the *amici* here, however, have an interest in this case since the state law under review, if upheld by this Court and adopted in other states, would operate to undermine the economic viability of the entire independent refining sector of the petroleum industry.

The import of Paragraphs B and C of the Maryland Motor Fuel Inspection Law, as amended, (the "Act")[1] is to prohibit petroleum producers and refiners from operating retail service stations located within the state with personnel employed by the company. It requires instead that

[1] Md. Ann. Code, Art 56, §157E (1972 Repl. Vol., 1976 Cum. Supp.).

all retail gasoline outlets be operated by service station dealers. The application of this statute to independent refiners, such as the *amici* group, merits special attention because the trial court expressly found that

> among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be eliminated, the effect of which would be anti-consumer, and that any law which had such an effect would not be in the interest of the public at large. (App. D, p. 130a).

The Maryland Court of Appeals did not disagree with this finding. To the contrary, it acknowledged that the State's expert witness had conceded the Act to be anti-competitive as applied to independent refiners. (App. A, 15a).[2] The reasons underlying these findings and conclusions are rooted in the distinct position which independent refiners occupy in the petroleum industry and, more specifically, in the retail gasoline market.

STATEMENT OF FACTS

Major oil refiners such as appellants Exxon, Gulf, Phillips, and Shell are fully integrated in that they produce the crude oil which their refineries process into refined

[2] References to appendices are to those contained in the joint Appendix filed by Exxon Corporation, the Phillips Petroleum Company, Gulf Oil Corporation, Continental Oil Company and its subsidiary, Kayo Oil Company, Shell Oil Company, Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation.

products and, typically, market their gasoline production under their own brand through a controlled network of franchised dealers. (A. 498, 526-27).[3] In contrast, independent refiners are only partially integrated. Although they are engaged in refining and marketing petroleum products, they produce only a small proportion of the crude oil needed to operate their refineries, and they lack networks of franchised dealers who must purchase their gasoline production from them.[4] Instead, independents purchase most of their crude oil from uncontrolled sources and market a substantial portion of their gasoline through independent marketers who have no contractual ties with them. (A. 498, 526-27).

Lack of control over their raw materials often results in serious competitive disadvantages which independents must overcome to maintain their marketshare and achieve profitability. When, for example, crude oil is in short supply, as it was during the period of the Arab oil embargo, independents must curtail production and suffer increased costs per barrel as fixed costs are spread over reduced production. (A. 501-03).

[3] The designation of "A" is to the appendix jointly filed by all parties to this consolidated appeal.

[4] These characteristics of an independent refiner, which are generally understood in the petroleum industry, have been incorporated into the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751, at §753:

> The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 percentum of his refinery input of domestic crude oil (or 70 percentum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

The problem is equally acute when the cost of crude oil rises rapidly, as it did in 1973 and 1974 in response to price increases by the OPEC cartel. Since independent refiners must purchase crude oil at prevailing market levels, the result of higher costs is to force their refined product prices substantially above the wholesale prices posted by major companies with access to ample crude supplies. Under such circumstances, independent refiners survive only by achieving cost efficiencies in refining and marketing which offset disadvantages stemming from this lack of a controlled source of crude oil.[5]

Selling gasoline at retail through company operated, high volume gasoline-only stations has proved to be an effective and necessary means of adapting to these competitive disadvantages. (A. 357, 450, 455, 503-04, 508, 517). Only in this way can independent refiners secure outlets or "safety valves" for their gasoline production. (A. 527-29, 635-26). If fluctuations in the availability and cost of the crude oil supplies render their wholesale prices uncompetitive with major competitors, they are assured of being able to market at least a portion of their production through their own controlled retail stations. Since these stations generally are unbranded, low-cost "gas-and-go" operations, marketing economies are achieved which can be used to offset disadvantages associated with higher raw

[5] During the "energy crisis" of 1973-74, when both of the problems discussed above were experienced in full force, independent refiners as a class sustained severe economic and competitive injuries. (A. 445-47, 504-05, 514). Their continued viability was preserved only by the passage of emergency legislation under which Congress required major companies to share their crude supplies with independents on an equitable basis and established a cost equalizing mechanism to offset the higher crude costs incurred by independents. In the Emergency Allocation Act of 1973, *supra*, Congress recognized as the appellee's expert witness noted below, that independent refiners were among the "victims" of the fuels crisis because of their crude oil deficiency. *See* 15 U.S.C. §753. *See also* A. 624-25.

material costs. (A. 348-56, 452, 454, 457-58, 506-07, 528-29). Without retail outlets of their own, independent refiners would be forced to curtail production at their refineries when higher costs prevent them from achieving competitive wholesale prices. (A. 505, 527).

Major refiners also have assured retail outlets for their gasoline production. Historically, they have marketed through networks of "dealers" to whom they lease stations under franchise agreements. (A. 526). These agreements require the dealer to purchase his gasoline from his supplier and sell it under the major's brand. In turn, the major furnishes the dealer with national advertising, credit cards, and other assistance in promoting the brand name. (A. 306, 350, 559-60).

Independent refiners are unable to market through branded dealer operations. They lack the enormous resources needed to establish brand recognition. (502-03, 527-28). Also, branded dealer stations typically are full-service stations offering repair services, tires, batteries and accessories, and other customer conveniences. The added costs associated with these services result in higher gasoline prices to the consumer. As discussed above, independent refiners must rely on low-cost, company operated stations where consumers are offered the choice of receiving a discount gasoline price instead of additional services. (A. 356, 370-71, 376-77, 452, 517, 588-89).

The retail gasoline market in Maryland is an accurate reflection of the role of independent refiners in the national petroleum industry. Appellants Ashland Oil, Inc. ("Ashland") and Commonwealth Oil Refining Co., Inc. ("Corco") are crude-deficient independent refiners who operate in Maryland exclusively through company operated, gasoline-only stations which offer prices several cents per gallon below those of full service, dealer stations. (A. 257-58, 451-52, 589). Ashland and Corco purchase

from uncontrolled sources, 85 and 100 percent, respectively, of the crude oil needed for their refineries. (A. 255, 257, 497-98). Both have operated through company owned and operated stations under the private brands of "Redhead", "HiFi" and "Scot", because they have determined that it is the only way they can profitably sell gasoline at retail in Maryland. (A. 258, 449, 502-04, 508, 626). In Maryland, neither company has ever operated through retail dealers. (A. 257, 258, 489).

In addition to retail sales, Ashland and Corco are major wholesale vendors of gasoline to independent marketers who also operate discount gasoline-only stations in Maryland but who do not engage in any production or refining activities. (A. 509, 624)

The trial court found, based on the undisputed testimony of witnesses for Ashland, Corco and the State of Maryland, that retail stations owned and operated by crude-deficient independent refiners are beneficial to consumers because they provide ". . . a powerful source of price competition with granded dealers." (App. D, 130a). Since independent refiners cannot operate their stations through dealers and preserve the high volume, discount marketing strategy which they now employ, the effect of the Maryland Act will be to require them to dispose of their stations and withdraw from the Maryland market. (A. 357-58, 457, 508, 519, 531). The Federal Trade Commission has recently warned against the burdens and market disruptions this withdrawal would cause.

> One problem is that several states — Maryland is a prime example — have enacted so-called marketing divestiture laws which do not require the sale of station premises, but do preclude direct operation of outlets by the refiners. Pushed through the legislature by the franchised dealers, such legislation has sometimes had the practical effect of eliminating from state mar-

> kets the *non-branded* dealers. These price-competitive retail outlets have generally been directly operated by employees of independent refiners. By failing to exempt these smaller refiners, who believe they cannot operate efficiently through a franchise system, these laws are apparently eliminating the very price cutters who most benefit consumers.[6]

The Commission's concerns were echoed by the expert witness called in defense of the Act. He acknowledged that he was "troubled" by the fact that it extended to independent refiners. (A. 590, 623). He said its application to independents was a "negative" feature of the Act because independents are pro-competitive factors in the market. (A. 630, 634-35). He admitted that independents lack the resources to compete unfairly in the marketplace and that their withdrawal from Maryland would reduce competition and the supply of gasoline to independent gasoline marketers. (A. 590). Perhaps most significantly, he also stated that if he had been called upon to draft the Act under review he would have excluded independent refiners from the scope of its prohibitions. (A. 631).

The Maryland Court of Appeals recognized that the State's witness had "conceded that the Act, by excluding certain partially integrated marketers, could in some respects be anti-competitive . . ." (App. A, 15a). That court held, however, without elaboration, that it could not substitute its judgment for that of the Legislature as to why these actors were included within the statutory classification. *Id.*

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[6] Statement of Owen M. Johnson, Director, Bureau of Competititon, Federal Trade Commission, before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources (May 25, 1977), at 8-9 (emphasis in original).

The burdens that would be created by the Maryland Act are identical to those the *amici* would face in other regions of the country if the Act is upheld and adopted in other states. Independent refiners would be forced to dispose of their stations and abandon retail gasoline operations in every state following Maryland's lead. Since their retail outlets are their only protection against fluctuations in crude oil costs, independents would be unable to compete effectively with major companies in the wholesale gasoline market during periods of rising raw material costs. Thus, the future viability of an entire segment of the petroleum industry is threatened by the Maryland Act which, as the trial court expressly found, "is designed to benefit one class of merchant to the detriment of another." (App. D 131a).

ARGUMENT

A. The Maryland Act Imposes A Significant Burden On Commerce.

The Maryland Court of Appeals held that the prohibition of company operation of retail service stations by producers and refiners did not burden interstate commerce because the Act

> would not in any way restrict the free flow of petroleum products into or out of the state. The Act merely regulates a wholly instrastate activity, the retail marketing of gasoline within the state. Producers and refiners would still remain free to import and sell petroleum products to wholesalers and to retail service station dealers. (App. A, 18a-19a).

The Maryland Court's conclusion reflects both an erroneous reading of this Court's precedents and a serious misconception of the facts.

The heart of the Maryland Court's legal position seems to be its view that no state regulation of commerce can infringe upon the Commerce Clause unless its effect is to hin-

der "either the import or export of goods." (App. A, 18a) However, it is well recognized that the Commerce Clause also prohibits regulations which interfere with the "natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976). Regulations which have the practical effect of increasing operating costs, hampering efficiency, and reducing competitive strength are as much a burden on interstate commerce as are direct embargoes on imports or exports. *Hunt v. Washington State Apple Advertising Commission*, __ U.S. __, 97 S.Ct. 2434, 2443-47 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 375, 381 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 781-82 (1945).

The record evidence plainly shows that those independent refiners which now market gasoline in Maryland through company operated stations could not continue to do so if the Act is sustained. (A. 357-58, 457, 509, 519). Even if they were somehow able to adjust to the Act's requirements, the added cost of operating through dealers would reduce their competitive effectiveness and thereby discourage them from continuing to distribute gasoline in this hostile regulatory environment. The likely result would be diversion of the gasoline that the independents now supply to Maryland into other states. (A. 508). The Maryland Court's suggestion that "there will be no significant disruption of the flow of petroleum products into the state" (App. A 24a) disregards economic reality.

The Maryland Court seems to believe that the Act would not offend the Commerce Clause if the total volume of goods sold in the State were not reduced. The record demonstrates that some sellers of gasoline would withdraw from the State if the Act is upheld, and that others would

be discourage from entering on the terms imposed as conditions of doing business there. (A. 376-77, 383). There is *no* evidence to suggest that the deficiency created by loss of these present and potential suppliers would be made up by other suppliers. However, even if the Maryland Court's unsupported conjecture is correct, it is legally irrelevant. This Court did not predicate its decisions in such cases as *Du Mond* or *Cottrell* on a finding that the *total* supply of products available in the regulated localities would be reduced, but rather on a finding that *particular* suppliers would be unjustifiably excluded from markets which they were constitutionally entitled to enter.

Equally unavailing is the Maryland Court's suggestion that the Act "merely regulates a wholly intrastate activity, the retail marketing of gasoline within the state." (App. A, 18a). It is scarcely possible to conceive of an activity having more extensive connections with interstate commerce. Every gallon of gasoline which is sold at retail in Maryland is produced and refined elsewhere and transported into the state by common carrier pipelines and other instrumentalities of commerce. The purchasers of these products include not only local residents but also interstate travellers and trucking companies. It is too late in the day to suggest that a business so dependent on interstate movements of supplies, and so vital to interstate customers, is beyond the reach of the Commerce Clause. *Daniel v. Paul*, 395 U.S. 298 (9169); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *F.T.C. v. Sun Oil Co.*, 371 U.S. 505 (1963); *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951).

B. The Maryland Act Discriminates Against Interstate Commerce

The precedents of this Court have repeatedly made clear that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977); *Great Atlantic & Pacific Tea Co. v. Cot-*

trell, supra, 424 U.S. at 370; *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327, 330 (1944). As this Court stated in *H.P. Hood & Sons v. Du Mond, supra,* 336 U.S. at 539:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

State regulations which offend that fundamental principal by discriminating against interstate commerce to favor local interests have been stricken down whenever they have been presented for review. *Hunt v. Washington State Apple Advertising Commission, supra; H.P. Hood & Sons v. DuMond, supra; Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Baldwin v. G.A.F., Inc.,* 294 U.S. 511 (1935);- *Buck v. Kuykendall,* 267 U.S. 307 (1925). This result has followed even when the discrimination has not been apparent on the face of the statute, *Nippert v. City of Richmond, supra,* 327 U.S. at 431, since the occasions are rare when a state would "artlessly disclose an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951). The test of discrimination is not what the state claims it is doing but rather whether the "practical effect" of the legislation is to place interstate traders at a disadvantage in competing for business against local interests. *Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2445; *Nippert v. City of Richmond, supra,* 327 U.S. at 431; *Dean Milk Co. v. City of Madison, supra,* 340 U.S. at 354.

The Maryland Court found that "the Act does not in effect discriminate against out-of-state economic interests as opposed to local interests" because it "is equally applicable

to all producers and refiners." (App. A 19a). This is a strange conclusion in view of the court's acknowledgement that some refiners market in Maryland exclusively through company owned stations, and that these companies — unlike the major oil companies which distribute primarily through dealers — would be required to adopt a distribution method which their management believed was impossible. (App. A 23a). The Act is, of course, "equally applicable" to all refiners, but the result of its application is not equal. Some refiners — the independents — will be prevented from marketing in the State by means of the only distribution method available to them, while others — the majors — may continue to engage in their customary marketing techniques.

The fact that all refiners, whether major or independent, are "out-of-state", with the result that discrimination at the refining level is between classes of interstate competitors rather than between local and interstate refiners, should make no difference. The freedom protected by the Commerce Clause "is a freedom to trade with any State, to engage in commerce across all state boundaries." *Boston Stock Exchange v. State Tax Commission, supra,* 429 U.S. at 335. This freedom is denied here to independent refiners, but not to the major oil companies with whom they compete. This form of discrimination as much offends the Commerce Clause as does the more common form of discrimination in favor of local interests, because it interferes "with the natural functioning of the interstate market." *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 806.

The basic flaw in the Maryland Court's analysis was its assumption that the conflict was between out-of-state refiners and non-existent "local" refiners. The real conflict here is between the local dealers who operate major brand service stations and the independent refiner-marketers who compete with them *at the retail level.* The

record shows that the stations operated by independent refiners provide an important source of retail price competition for the dealer operated major brand stations. This competition will be eliminated by the Act. The beneficiaries will not be the Maryland consumer or the interstate travellers who purchase gasoline within the State, but the dealers who seek this business for themselves. A more palpable case of discrimination against interstate sellers and purchasers in favor of local interests can scarcely be imagined.

This Court observed in *Nippert v. City of Richmond, supra*, 327 U.S. at 434, that taxes levied against itinerant salesmen "lend themselves peculiarly" to creating discriminations against interstate sellers in favor of local merchants, and that "this is often if not always the object of the local commercial influences which induce their adoption." More recently, this Court found it "somewhat suspect" that a North Carolina ordinance respecting the labelling to be used for containers in which apples were shipped had been adopted in response to pressures from local growers. *Hunt v. Washington State Apple Advertising Commission, supra*, 97 S.Ct. at 2446.

What was only suspected in *Nippert* and *Hunt* is clearly evident in this case. The principal proponent of the Act before the Maryland legislature was the Greater Washington/Maryland Service Station Association, whose representative testified that there was a need to protect the 700 Maryland dealers represented by this association from "company operated 'Gas and Go' outlets which sell gasoline only with no service to the motorist." (A. 758).[9]

[9] Dealer organizations have also supplied the primary impetus for the enactment of divestiture statutes in other states. *See* Statement of Owen M. Johnson, Jr., Director, Bureau of Competition, Federal Trade Commission, commenting on H.R. 130 and related bills, before the Subcommittee on Energy and Conservation of the Senate Committee (continued)

Other pressures were brought to bear by local wholesalers, who had been included in the original bill sent to the Legislature by the Governor. (A. 723-26). The result was a divestiture provision which excluded wholesalers,[10] and provided that all Maryland stations supplied by producers or refiners "must be operated by a retail service station dealer." These facts, coupled with the obvious competitive advantage flowing to dealers from elimination of the lower priced refiner operated "gas-and-go" outlets, leave no doubt that the purpose and effect of the Act was to benefit local merchants at the expense of their out-of-state competitors.

C. The Act Is Not Justified By Any Legitimate State Interest.

When discrimination against interstate commerce has been demonstrated, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission, supra*, 97 S. Ct. at 2446. *See also Great Atlantic & Pacific Tea Co. v. Cottrell, supra*, 424 U.S. at 371-72; *Pike v. Bruce*

[9](Continued)
on Energy and Natural Resources (May 25, 1977) at 8-9; Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 Vand. L. Rev. 1277, 1307 (1975).

[10] The draftsman of the bills testified he had included wholesalers so as "not to discriminate against one class as to another." He could not explain why the wholesalers had been eliminated by amendment, but did say he had "heard" the reason was that "some of the wholesalers being local jobbers . . . wanted to plea upon the mercy of the committee so to speak and amend themselves out . . . . " (A. 568). It thus appears that the Legislature's decision to exclude wholesalers was also the product of the kind of "local commercial influences" referred to in *Nippert*.

Church, Inc., supra, 397 U.S. at 142; *Dean Milk Co. v. City of Madison, supra*, 340 U.S. at 354. This burden is especially great when the interest asserted is unrelated to the protection of health and safety, because promotion of local economic interests is permissible only if there is no undue discrimination against out-of-state interests. *H.P. Hood & Sons v. Du Mond, supra*, 336 U.S. at 531-32.

The Maryland Court concluded "[t]here is every indication that the purpose of the statute was to preserve competition within the retail gasoline marketing industry in Maryland." (App. A, 19a). It based this conclusion on certain evidence offered to the Legislature which tended to show that "company operated stations received greater allocations of gasoline during a period of shortage than did dealer operated stations" and that "the oil companies intended to increase the number of company operated stations." *Id.* The court made no findings of its own, because it appeared to believe the only issue was whether the Legislature could rationally conclude that the regulation was needed to preserve competition.[11] It also failed to consider whether the divestiture remedy selected by the Legislature bore any relationship in fact to the "evils" it wished to correct.

The most striking feature of the Court's analysis in this regard was its total failure to relate the assumed legislative objectives to independent refiners. All of the reasons given for adoption of the Act relate to the major oil companies, which market primarily through contractual arrangements with dealers. Independent refiners have no dealers to terminate unfairly or to discriminate against in the allocation of supplies. It is thus apparent that the purported objective of protecting dealers from unfair manipulation by their

[11] This assumption is erroneous. The determination of the validity of a statute under the Commerce Clause cannot be based solely on this issue. *See City of New Orleans v. Dukes*, 427 U.S. 297, 304 n. 5 (1976); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959).

suppliers cannot be offered as a reason to require independent refiners to cease company operations of their retail stations.

The Maryland Court concluded, somewhat ironically, that the prohibition against company operated stations was needed to prevent control of the retail market "by a few major oil companies." (App. A, 19a). The actual effect of the requirement, however, will be to accelerate that control by excluding the only real competition the major oil companies have.

The trial court found, on the basis of the record evidence, that exclusion of independent refiners would eliminate "a powerful source of price competition with the branded dealers . . . , the effect of which would be anti-consumer." (App. D, 130a). The trial court also found "[t]here was no proven detrimental effect upon the retail market caused by company-owned-and-operated stations which could not be curbed by federal and state anti-trust laws." (App. D, 130a). The Court of Appeals did not disagree with those findings.

The burdens imposed upon independent refiners by the Act cannot be said to be merely incidental effects of otherwise appropriate legislation. These burdens amount to a complete prohibition of operations by these interstate companies in Maryland. Such a result is "clearly excessive in relation to the putative local benefits" advanced in favor of the Act. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

CONCLUSION

For the reasons stated, the judgment of the Maryland Court of Appeals upholding Paragraphs B and C of the Maryland Motor Fuel Inspection Law should be reversed.

Respectfully submitted,

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November 17, 1977

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IN THE

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OCTOBER TERM, 1977

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On Appeal From The
Court of Appeals of Maryland

MOTION OF NATIONAL CONGRESS OF PETROLEUM RETAILERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

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MOTION OF THE NATIONAL CONGRESS OF PETROLEUM RETAILERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

The National Congress of Petroleum Retailers ("NCPR") hereby moves, pursuant to Supreme Court Rule 42, for leave to file a Brief *amicus curiae* in support of Appellees. This Motion is necessitated by the refusal of certain of the Appellants to consent to the filing of the appended Brief.

The interests of *amicus curiae* NCPR is set forth in detail in its Brief. To summarize, NCPR represents approximately 80,000 independent branded gasoline dealers through approximately 48 affiliates throughout the United States, including an affiliate in the State of Maryland. One of the purposes of NCPR, as set forth in its By-Laws, is to represent and act on behalf of independent branded gasoline dealers throughout the United States in matters directly affecting their business interests.

The determination of the Court of Appeals of Maryland that the Motor Fuel Inspection Law, codified in the Maryland Annotated Code (1957), Art. 56, § 157e (1972), repl. vol., (1976 Cum. Supp.), does not violate, *inter alia,* the Commerce Clause of the United

States Constitution (Art. I, § 8, Clause 3), is of obvious significance to our member independent gasoline dealers.

During the last four years, the legislatures of some 33 jurisdictions have adopted, considered, or had as pending business, proposals which are similar to the Act at issue here. Thus, the decision of this Court in this action will have a direct and vital impact on the relationship of all independent branded gasoline dealers with their franchiser-suppliers. This impact will be felt not only by independent branded gasoline dealers in the State of Maryland, but by dealers in the other states as well.

NCPR has developed a reservoir of information and legal background relevant to the issues which this Court is being called upon to decide. It particularly believes that its practical expertise and its overall familiarity with the hearings and reports of both state and federal legislatures, will allow it to materially assist this Court at arriving at a decision in this matter.

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On Appeal From The
Court of Appeals of Maryland

BRIEF OF THE NATIONAL CONGRESS OF PETROLEUM RETAILERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

The National Congress of Petroleum Retailers (hereinafter "NCPR") is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 2021 K Street, N.W., Washington, D.C. 20006.

NCPR represents approximately 80,000 independent branded gasoline dealers through approximately 48 affiliates throughout the United States including an affiliate in the State of Maryland.

One of the purposes of NCPR, as set forth in its By-Laws, is to represent and act on behalf of independent branded gasoline dealers throughout the United States in matters directly and indirectly affecting their business interests.

The determination of the Court of Appeals of Maryland that the Motor Fuel Inspection Law, codified in the Maryland Annotated Code (1957), Art. 56, § 157e (1972), repl. vol., (1976 Cum. Supp.), does not

violate, *inter alia*, the Commerce Clause of the United States Constitution (Art. I, § 8, Clause 3), is of obvious significance to our member independent gasoline dealers.

During the last four years, the legislatures of some 33 jurisdictions have adopted, considered, or had as pending business, proposals which are markedly similar, if not identical, to the Act at issue here. Thus, the decision of this Court in this action will have a direct and vital impact on the relationship of all independent branded gasoline dealers with their franchiser-suppliers. This impact will be felt not only by independent branded gasoline dealers in the State of Maryland, but by dealers in the other states as well.

ARGUMENT

THE DIVORCEMENT REQUIREMENT EMBODIED IN PARAGRAPHS (B) AND (C) OF THE "MARYLAND ACT" IS A NECESSARY AND CONSTITUTIONALLY VALID EXERCISE OF STATE AUTHORITY

A. Introduction

Appellants constructed and urged upon the Maryland Court of Appeals a multiplicity of purported Constitutional arguments as apparent support for their attack, albeit unsuccessful, upon the validity of Paragraphs (B) and (C) of the Maryland Fuel Inspection Law, as amended (the "Maryland Act"). Appellants here have abandoned all grounds for their appeal from Paragraphs (B) and (C) except as to their constitutionality under the Commerce Clause (Art. I, S8, Clause 3). Therefore, this amicus brief will deal only with that question.

The general proposition is clear that the Federal judiciary is hesitant to interfere in State economic regulation except where there is a clear burden placed on interstate commerce and that burden outweighs the value of the State's reason for attempting regulation,[1] or where discrimination is made against outsiders.[2]

Paragraphs (B) and (C) of the Act are clear in their command: they prohibit only the *operation* of service stations by producers and refiners of petroleum products. They do not prohibit ownership of outlets by Appellants nor inhibit Appellants' right to obtain additional outlets. It cannot be too strongly emphasized that functional divorcement, *not* divestiture, is all that is required by the Act. The only practical effect of the Act, therefore, is to prohibit Appellants from engaging in vertical price maintenance or price fixing at their retail outlets.

B. Paragraphs (B) And (C) Of The Maryland Act Do Not Discriminate Against Interstate Commerce.

Despite the broad and imprecise statements in Appellants' briefs, Paragraphs (B) and (C) of the Act simply do not discriminate against interstate commerce. These Paragraphs in fact require only one change in the method by which refiners or producers can market their gasoline product at retail. They state simply that the retail outlets owned by refiners or producers must be operated by an independent dealer.

---

[1] See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Bibb* v. *Navajo Freightlines, Inc.*, 359 U.S. 520 (1959); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 443 (1960).

[2] *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

There are, of course, only two primary means by which a retail station can be operated. The first is by an independent dealer; the second is by a company employee or agent. In the case of the major brand refiners and producers (hereinafter referred to as "Majors") operating in the State of Maryland, approximately ninety-two percent of their stations already are operated by independent retail dealers. The Act does nothing more, or nothing less, than require that where a station is presently being operated by a company employee, the company employee must either be converted to a retail dealer or a retail dealer must be substituted for the company employee.

The essential requirement of Paragraphs (B) and (C) of the Act, therefore, relates to the operation of stations in which either the ownership or the underlying leasehold interest rests with Appellants. There is nothing in the Act which requires that the retail dealer be a resident of the State of Maryland. Each Appellant remains as free to reach outside of the state to obtain its retail dealers in the future as it has been to obtain its company employees in the past. There is no geographical limitation on any Appellant's discretion in obtaining the retail dealers utilized in operating their stations.

The Act is devoid of any language whatsoever which in any way discriminates against any outside interest relating to the subject matter of the Act in favor of local interests.

The principal difference between a company employee-operated station and a dealer-operated station is that the dealer operates under a lease and dealer agreement which sets forth the terms and conditions

under which he may operate that station.[3] This is not dissimilar from the instructions which are given to the employee who is operating a dealership.

The lack of discrimination can be clearly demonstrated as the Act requires no change in the personnel who are, in fact, operating the Appellant operated stations presently, and the personnel who could operate the stations under the challenged Act. The Appellants need only allow the present employee operator to substitute for his employment relationship a dealer supply and lease agreement. They then could continue to operate the stations with the same personnel as they have in the past. There is only one difference. With a dealer operator, Appellants may not legally fix the retail price of gasoline which they sell in their stations.

This difference, and this difference alone, is both the discrimination and burden which Appellants claim. As Appellants have presented it, the real question which they ask this Court to decide is whether the Commerce Clause gives them a Constitutional right to fix the prices of gasoline sold in retail outlets which they supply and own.

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[3] The Dealer lease and Dealer agreement generally are dependent each on the other and are executed simultaneously. Courts generally have treated them as a single agreement in the nature of a franchise agreement and have applied franchise law in interpreting them. See *Shell Oil Co.* v. *Marinello*, 1972 Trade Cases ¶ 74,178.

Additionally, such agreements are exclusionary in the sense that the dealer is required to purchase gasoline only from his lessor-supplier.

C. Paragraphs (B) and (C) of the Act Do Not Impose Any Burdens On Interstate Commerce

Appellants argue that Paragraphs (B) and (C) of the Act, as applicable to each of them, place a significant burden on interstate commerce.

Although the Majors devote some twenty-two pages of their brief in apparent support and documentation of the magnitude of the Act's effects upon them, as Appellant Ashland correctly points out in its Brief:

> "The prohibition against refiner operation of retail service stations will have little effect on the major brand stations the vast majority of which are operated by dealers." *Id.*, at 15.

Indeed, as pointed out by the Majors in their own Brief, only eight percent of their Maryland stations are presently operated by company employees.

The principal arguments advanced by the Majors are that by virtue of Paragraphs (B) and (C) of the Act interstate commerce will be significantly burdened because they will be denied the opportunity for experimentation regarding new and different methods of marketing gasoline, and, thus, that the "flow of petroleum products and capital into Maryland" will be obstructed. Both assertions are without support. Nothing in the Act requires or will have the effect of requiring the Majors or any other producer or refiner to close any stations which they are presently operating. Nothing in the Act will prohibit the Majors or any other producer or refiner from building new stations in whatever form, design or manner in which they choose.

If any refiner or producer, for instance, desires to convert its stations from a full service station to a gasoline-only outlet,[4] nothing in the Act will prohibit it from doing so. Any Appellant may write into a dealer agreement any terms or conditions it desires in order to effectuate specific policies, such as how it wishes the station to be operated, including methods and, in most states, hours of operation. Appellants have done this in the past and this Act allows them to do so in the future.

There are only two exceptions: (1) Appellants may not set the retail price; and (2) Appellants may not force the dealer to stock their own brand of TBA (tires, batteries and accessories).

In all other aspects, they may engage in such experimentation or change as they desire without hindrance insofar as this Act is concerned.

Similarly, as the Majors cannot under these circumstances rationally argue that Paragraphs (B) and (C) place any burden whatsoever on interstate commerce, neither, as will be shown below, can the non-Major producers and refiners (hereinafter referred to as "Independents").

---

[4] A full service outlet generally contains bays for repair work and incidental automobile maintenance such as oil changes and lubrication. In a full service station also, the operator generally will perform such services on the automobile as checking the oil and battery, adding water to the radiator and checking the air in tires. On the other hand, a gasoline-only outlet has no bays and the only service performed by the operator is putting gasoline in the automobile. Many gasoline-only outlets have equipment for self-service. However, full-service stations may also provide self-service.

With respect to the Independent Appellants, the same arguments apply except that in cases such as Ashland, but not in all, there would need to be a greater shift from company employee to dealer. However, as set forth above and contrary to the arguments made in Appellants' Briefs, this shift can be accomplished by the very simple expedient of substituting a dealer agreement for the employee's present employment agreement.

Independents argue, in effect, that it is imperative for their economic viability that they be allowed to continue their use of the company-operated retail outlet as a mechanism to fix the retail price of the gasoline. These Appellants also assert that somehow their efficiency will be impaired if their stations are required to be operated by dealers rather than employees.

That the Independents do not desire price competition is apparent from the recent verdict of a Maryland Federal jury in *United States of America* v. *Society of Independent Gasoline Marketers of America* (United States District Court for the District of Maryland) where Ashland Oil, Inc., Amerada Hess Corporation, Kayo Oil Company, and others were found guilty of fixing the price of gasoline in the State of Maryland, and, indeed, in the entire Eastern Region of the United States. As the evidence in that case revealed, there is no question that it is easier to fix the price of gasoline horizontally when outlets are employee operated than when they are dealer operated.

However, notwithstanding Appellants' desire, Congress and the Courts have long ago determined that competition and not price-fixing benefits the public

and constitutes the economic lifeblood of our nation.[5] It is this national policy, and the economic interests of its citizens, which the State of Maryland specifically seeks to further by this Act.

What the Independents in fact argue to this Court is that if they cannot in the future fix the price of gasoline sold at their retail outlets, somehow they will not be able to sell gasoline in the State of Maryland profitably and, therefore, must withdraw. This is palpable nonsense.

It fallaciously assumes, for example, that the economic self-interest of an independent dealer selling gasoline from an Appellant-owned outlet will be less than the Appellant's.

However, the retail dealer has been and must remain competitive in the geographic area in which he operates, and price accordingly. The retail dealer has no alternative; he must make his living from one specific outlet. Practically stated, this requires that he either sell gasoline or perish. To sell gasoline, the retail dealer must price at a level that will allow him to do so.

Appellants which operate their own outlet, on the other hand, operating as they do many outlets, can operate with some inefficiency and still make an overall profit. The independent dealer does not have that luxury.

Moreover, there is nothing in this Act which forbids any Appellant from either raising or lowering its

[5] See generally, *Northern Pacific Ry. Co.* v. *U.S.*, 356 U.S. 1 (1958), and Section "D," *infra*.

wholesale prices to the independent dealers. Traditionally, because of competition in the marketplace, when wholesale prices rise, it is the dealer that is ordinarily forced to absorb the most significant portion of that amount.[6]

On the other hand, where wholesale prices have been lowered, dealers will traditionally lower their retail prices in order to get a larger share of the business. Therefore, if Independents wish to have their product sold at lower prices than the Majors, they still have the obvious alternative of charging their dealers lower wholesale prices. The relationship between retail margins and wholesale prices is so well established in the gasoline industry that when the Federal Energy Office froze gasoline prices in 1973, it did so on the basis of dealer margins.

The undisputed testimony in two recent cases demonstrates that from a practical standpoint, the Independents' "burden" arguments cannot be supported. In *Crown* v. *Brice, et al.*, C.A. No. 75-0361-R (United States District Court for the Eastern Division of Virginia, Richmond Division), the testimony was undisputed that Crown began marketing in 1969 through only employee-operated outlets. By 1971, this method of marketing had resulted in unmitigated financial

[6] Proof is contained in statistics maintained by the Department of Energy which show a steady decrease in dealer margins since 1974 below the margin allowed them by Federal Energy Administration regulations. Significantly, during the same period of time refiners' margins have almost doubled. *See*, U.S. Dept. of Energy, Monthly Energy Review, October 1977; Federal Energy Administration, Preliminary Findings and Views Concerning the Exemption of Motor Gasoline from the Mandatory Petroleum Allocation and Price Regulations, August 1977.

disaster for the company. It then substituted independent operators for company employees. The result was a dramatic financial turnaround; Crown began making a profit with independent dealers at the same outlets which previously had been losing money under company operation. It was only after the independent dealers had built up the outlets so as to make them profitable that Crown began to take over these stations with its own employees.

The Independents' "burden" arguments may also be contrasted with the undisputed testimony in *Call Carl Inc. et al* v. *British Oil Corp. et al.*, Civ. No. 73-1059-Y (U.S. District Court, District of Maryland). BP in the middle '70's, effectuated a management decision to substitute a "Gas And Go" or "Gas Only" concept of marketing in many of its marketing areas. At the time, and because of the Maryland Act, BP determined that it would operate its Maryland "Gas And Go" stations with independent operators rather than with employees as it was doing in such stations outside the State of Maryland. The fact that the Act required it to operate such Maryland stations with dealers in no way deterred the change. BP instead devised a dealer lease and agreement for its independent dealers that provided additional economic incentives to those who were able to sell high volumes of gasoline, with corresponding built-in economic disincentives for dealers who sold lower gallonage of gasoline. Thus, BP utilized an incentive factor in its dealer agreements to achieve the desired result without the disadvantage to the public inherent in vertical price-fixing.[7]

[7] NCPR does not endorse this approach and believes it may constitute a violation of Federal antitrust laws. However, the fact remains it was done and has not been challenged.

The transparency of Appellants' "efficiency argument" is also revealed when that argument is examined in other than Appellants' theoretical vacuum. In the dealer-operated station, the dealer absorbs all labor costs, local and state taxes (other than property taxes), insurance and other costs incidental to the maintenance of the station. In addition, the independent dealer must absorb all pilferage which in many cases can be substantial.

Finally, in a dealer-operated station, the dealer is paying rental to the company for the use of that station which, of course, the company does not receive when it operates the station itself.

Under these circumstances, the argument that somehow there are economic efficiencies involved in an employee-operated station over a dealer-operated station is nebulous at best. Indeed, in this area it can be forcefully argued that the refiner and producer have less expense where an outlet is operated by an independent dealer than where it is operated by an employee. This is the primary reason why the Majors operate ninety-two percent of their stations in the State of Maryland with independent dealers.

What the independent producers or refiners are arguing is not that interstate commerce will be burdened, but rather that they will be burdened by not being able to fix retail prices. In a constitutional sense, the difference is crucial.

D. Paragraphs (B) and (C) of the Act Advance Substantial And Legitimate State Interests

Even assuming, *arguendo,* that Paragraphs (B) and (C) imposed some burden on interstate commerce, the

burden will be tolerated unless it outweighs the value of the state's reason for adopting the legislation. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1970).

Certainly there is no disagreement that the responsibility of a state in protecting its trade in commerce from unlawful restraints of trade is substantial. This is particularly true where a product like energy, so vital to the citizens of the state and the state itself, is involved.

Insofar as the Majors are concerned, the significant factor is that eight percent of their outlets are, in fact, employee-operated and that the number has been steadily increasing. The evidence presented at various Congressional hearings and the experience of Dealers overwhelmingly demonstrate that the Majors utilize employee-operated outlets for the purpose of controlling the prices of their independent dealer outlets in the same marketing area.

For instance, in a typical marketing area in which a company such as Exxon may have twelve dealer-operated outlets, it requires only one employee-operated outlet in that marketing area to control and influence the price which the independent dealers can charge in that marketing area.[8]

As pointed out by Appellants, price is a crucial factor in the retail sale of gasoline. While a retail dealer may deviate by one or two cents per gallon

[8] At the same time the Majors are able to hold the wholesale prices up because the dealer has no alternative source of supply. Therefore by this tactic, the squeeze is placed on the dealer instead of the wholesale price being lowered which in the longer run would cause lower prices for consumers.

from another station selling the same brand in the same trading area, its ability to deviate more than a minor degree in price is both limited and controlled by what another dealer selling the same brand in that area is charging.

Therefore, assuming the state has a legitimate interest in price competition in the sale of gasoline, it is certainly a valid exercise of that interest for a state to enact legislation that will prohibit the Majors from utilizing, as they have consistently in the past, such devices as company-operated outlets for controlling the retail price of their own retail dealers.

The Maryland Legislature did not promulgate this Act, and more specifically Paragraphs (B) and (C), in a factual vacuum. It had available to it countless hearings, reports and legislative studies to support its action. These hearings and studies clearly demonstrate that competition in the petroleum industry traditionally has occurred at the retail level and that vertical integration by refiners and producers is inimical to competition at the retail level and the public interest.[8a]

More recent materials reflect similar findings. For example, the House Subcommittee on Energy and Environment of the House Committee on Small Business has published a report[9] entitled "Problems of Small

[8a] For example, in his testimony before The Economic Matters Committee of the Maryland Legislature in March 1974, Vic Rasheed, Executive Director of The Greater Washington/Maryland Service Station Association cited pertinent sections of the Conference Report (93-628) on S 1570 (Energy Petroleum Allocation Act of 1973), which expressed U.S. Congressional concern with "downstream vertical integration of the major oil companies into the distribution and retail levels of the market."

[9] House Report No. 94-1762, 94th Cong., 2d Sess., dated October 20, 1976.

Retail Petroleum Marketers." The Report notes with concern that:

> "In a 24-month period between the beginning of 1972 and the end of 1974, the total number of retail gasoline service stations in operation in the United States decreased by more than 30,000 which is equivalent to about 15% of the number of such outlets. While the loss of this many business opportunities within the general economy would be disturbing, a decrease of this magnitude within just one sector of a single industry is disastrous. Even more alarming is the prediction that, if present trends continue, an additional 40,000 service stations will go out of business by 1980. The combined loss of 70,000 retail petroleum marketing outlets within an eight year period will mean that by 1980, one out of every four service stations which existed in 1972 will be permanently closed. This will not only mean that 70,000 businessmen have lost the opportunity to compete in our economic system, but that consumers will be deprived of 70,000 alternative sources of fuel and automotive repair services and of the competitive prices from the continued operation of those alternative sources of supply." *Id.* at 1.

The Report continues:

"The fact that integrated oil companies are selling gasoline through company owned and operated stations for an average of 5 cents a gallon less than their own branded lessee dealers has serious implications for the small business retailer. The branded dealers' market share has already fallen by 8% and they traditionally have not maintained their volume in a market that offers such price differences. This is particularly true in those instances where the refiner's company operated station sells gasoline under its own

brand name as does Exxon, Marathon, Hess, ARCO and others and thus directly competes on a brand name basis with its own branded dealers.

By concentrating on self-service and low retail gasoline prices, these refiners can undercut their own branded dealers. While many branded dealers believe they can survive the competition from the independent marketers and even from the secondary branded outlets, they strongly assert that they cannot endure price competition from their suppliers who market gasoline using the same brand name nor can they long endure the coercive economic pressures which can be exerted against them by a refiner upon whom they are dependent for their supply." *Id.* at 15.

The Subcommittee also pointed out in its Report that:

> "In order to protect their independent marketers, some European governments have adopted regulations which impose limitations on the number of stations a refiner can own and which separate the refiner from retailing. The United States has yet to adopt any policy which would effectively protect a small business dealer or independent marketer from the coercive economic power of refiners. As a result, refiner owned and operated stations are increasing their share of the market, and the individual dealers are being forced out of business.

It stated further:

> "While this in some instances may be temporarily providing the American consumer with lower priced gasoline, the ultimate effect will be the destruction of the independent segment of the retail sector of the petroleum industry. Since the independent marketer has historically supplied the price competition in the retail sector and since integrated companies have traditionally avoided

price competition, the existing restraints on retail prices will be gone forever." *Id.*

The Subcommittee's Findings, as embodied in its Report, are particularly enlightening here:

"CHAPTER IV.—FINDINGS

"The Subcommittee finds that the continued economic viability of both the independent branded and non-branded retail petroleum marketer is being jeopardized by the forward integration of refiners into the retail marketing sector of the petroleum industry. The Subcommittee believes that if this trend is allowed to continue, the small independent marketer will cease to be a competitive force and will continue to experience a decline in both numbers and market shares, which will not only be harmful to the interest of small business, but will also be detrimental to the best interests of the American consumer who will be harmed by the increased economic concentration in the petroleum industry which result from this forward integration be refiners."

Indeed, one of the Subcommittee's specific recommendations was:

"C. That the appropriate committees of Congress favorably consider legislation which would:

"(3) Prevent refiners from directly competing with the small business retailers they supply by prohibiting them from directly operating retail gasoline outlets or engaging in the direct retail marketing of gasoline."

See also, Hearings on H.R. 8117, the Small Business Petroleum and Petrochemical Marketers Protection Act of 1975.[10] At these hearings the Subcommittee

[10] Before the Subcommittee on SBA and SBIC Legislation of the House Committee on Small Business, 94th Cong., 1st Sess., July 22, October 30, November 13, December 11, 1975; February 24, March 2 and 3, 1976.

Chairman, the Honorable Neal Smith, stated that:

"There are sure to be periods of shortage in the future and unless something is done more small businessmen in gasoline marketing will be financially ruined. This fully integrated petroleum industry has overtones of an anticompetitive nature which destroy our competitive free market system and ultimately harm not only the small businessmen who are engaged in this business but also the consumer of petroleum products who will be forced to pay an inflated price due to the lack of competition."

Representative Smith concluded that the tool needed to enable small businessmen engaged in the marketing of petroleum and petrochemical products to remain viable entities and to promote competition is H.R. 8117:

"This bill would require the major oil refiners to dispose of their retail and wholesale outlets within 3 years. In this 3-year interim, they would be prohibited from expanding their wholesale and retail outlets."

The significance of these hearings and the proposed legislation is, of course, that after a careful review of the evidence, these Congressional Committees believe actual divestiture—one step beyond the divorcement required in the Maryland bill—to be absolutely necessary.

Under the proposed Federal legislation the refiners and suppliers would actually have to dispose of their retail properties. Under the Maryland Act, they are

allowed to keep their properties and need only operate them with independent dealers rather than employees.

See also Hearings on the Petroleum Marketing Practices Act,[11] which involved three bills, S. 19, S. 74 and H.R. 130, relating primarily to problems involved in gasoline distribution.

During the course of the hearings, Owen M. Johnson, Jr., Director of the Bureau of Competition of the Federal Trade Commission, testified:

> "Mr. JOHNSON. I have made a suggestion in my prepared text. I think in the last analysis all of these legislative suggestions are mere bandaids. I was interested to hear Professor Allvine say we are addressing the symptoms, not the cause. My suggestion is to consider seriously the divestiture of petroleum refining and marketing. Otherwise, the leverage problem is inherent both in the relationship of the refiner to the dealer who has to lease his premises from that refiner, and in the dual distribution situation where the refiner has the ability to locate directly operated stations in juxtaposition to his own lessee dealers."

See also Report of the Committee on the Judiciary of the United States Senate on S. 2387, Petroleum Industry Competition Act of 1976.[12] The Report stated in part:

> [W]e conclude that there is no economic advantage for society as a whole from vertical integration. As Exxon has persuasively demonstrated in the Wisconsin tax court proceedings, each functional level of the major integrated companies is fully capable of operating on its own.

[11] Hearings before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess., May 25, 1977.

[12] S. Rept. No. 94-1005, 94th Cong., 2d Sess., dated June 28, 1976.

> *The efficiencies claimed for vertical integration are, in reality, the advantages of market control and produce no public benefits.* The task of restructuring the major companies, while of considerable dimensions, involves problems no more difficult or complex than those regularly handled by the financial community. There is no reason why divestiture should in any way jeopardize the interests of shareholders, debtors, employees or pension holders." [Emphasis supplied]

The Report concluded:

> "Granted, divestiture provides no complete solution to the problem. It offers only a very reasonable chance for somewhat lower prices, but it is a measure we owe to the world to take."

Again, it should be emphasized that this report recommended total divestiture—as contrasted with the relatively simpler and less drastic divorcement solution embodied in the Maryland Act.[13]

Although Congress has recognized the problem, and although Federal legislation has been introduced which would in the national interest require not simply divorcement of retail operations but total divestiture of the properties involved, Congress has yet to act.

[13] See also Hearings of the Senate Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on Vertical Integration in the Petroleum Industry (94th Cong., 1st Session, September 23, 26, October 29, 31, November 12 and 19, 1975); Hearings before the Senate Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on Marketing Practices in the Gasoline Industry (92nd Cong., 1st Session, July 20, 21, 22 and 23, 1971); and Hearings before House Select Committee on Small Business on the FTC Industry Conference on Marketing of Automotive Gasoline. (89th Cong., 1st Session, May 3, 4, 5, 6, 10, 11, 12, 20 and July 19, 1965.)

Maryland, therefore, as have other states,[14] has taken action in an area of legitimate state concern, in which the Federal Government has not yet acted. Certainly in our federalistic form of government a state should be encouraged to pass legislation for the protection and welfare of its citizens rather than being forced to wait until such time as the Federal Government is disposed to act. This Court has historically encouraged States to do just that. See, *e.g.*, *Cooley* v. *Port Wardens,* 53 U.S. (12 How.) 299 (1851); *Parker* v. *Brown,* 317 U.S. 341 (1943). In *Parker,* this Court said:

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. . . ." *Id.* at 362-3.

Here, of course, the state and national interests are concurrent, and the Federal Government has not yet preempted the field.

Finally, Appellants argue that this is class legislation establishing an "enclave" to protect gasoline dealers from competition. An enclave from whom? Dealers compete with other dealers in their own trading areas. There is nothing in this legislation which in any way could diminish the vigor of that

[14] During the last four years, the legislatures of thirty-three jurisdictions have adopted, considered, or had as pending business proposals which contain provisions similar to Paragraphs (B) and (C) of the Act.

competition. Indeed, if anything, it increases that vigor for the reasons set forth above and by adding to the numbers of competitors competing with each other.

The fact that a legitimate state interest is served by legislation which primarily concerns a specific class of competitors is of no consequence, and certainly does not render the legislation unconstitutional under the Commerce Clause. For example, most of the states have laws dealing with the problems of automobile dealers in their relationships with their suppliers —the automobile manufacturers.[15]

Such a Minnesota law was specifically upheld, despite the manufacturer's charge that it violated the Commerce Clause, in *Willys Motors* v. *Northwest Kaiser-Willys,* 142 F.Supp. 469 (D.Minn. 1956). The Court held that:

> "Laws 1955, Chapter 626 directly affects only manufacturers and dealers of automobiles, but it is reasonable to conclude that the statute has a public purpose when it attempts to alleviate an adverse economic condition directly affecting most of the 1,400 automobile dealers in the State of Minnesota and indirectly affecting thousands of others and a substantial segment of the economy. A law which seeks 'protection of a basic interest of society' will be upheld. Home Building & Loan Ass'n v. Bla...ell, 290 U.S. at page 445, 54 S.Ct. at page 242."

In *Willys* the Court also cited with approval the decision of the Wisconsin Supreme Court in *Kuhl Mo-*

[15] In addition, many states have laws prohibiting manufacturers of beer from engaging in the wholesaling of beer within a state. Such laws to our knowledge have never even been successfully challenged.

tor Co. v. *Ford Motor Co.*, 270 Wis. 488, 71 N.W. 2d 420, 427, which held that:

> "The fact that the persons to be benefited by this regulatory measure are confined to one class of our citizens, auto dealers, does not militate against the same being a legitimate exercise of the police power."

See also *Ford Motor Co.* v. *Chester R. Pace, etc., et al.*, 355 S.W. 2d 420 (1960), where the Tennessee Supreme Court discussed the various state automobile dealers' statutes and concluded:

> "It is not at all unreasonable for us to believe that the Legislature had the purpose in mind in enacting this legislation to protect the public safety, health, and/or public morals of its people. When we thus have determined that the legislation is reasonable, certainly under the Section of our Constitution hereinbefore referred to and the 14th Amendment to the United States Constitution, this legislation is not unconstitutional merely because it is attempting to regulate the motor vehicle or automobile industry, its dealers, salesmen, etc."

In upholding each of these state statutes, the respective Court have emphasized the importance of transportation to a state. Equally important are laws involving an industry which provides the fuel with which those vehicles operate.

One can understand Appellants' desire to be allowed to fix the price at which they sell their gasoline at retail outlets. However, there is an irreconcilable conflict between that desire and the legitimate desire of the State that its citizens purchasing gasoline be assured the maximum benefits of competition. It is the undeniable state interest, as expressed in the challenged legislation, and not Appellants' desire, which is entitled to prevail here.

CONCLUSION

For the foregoing reasons, the decision of the Maryland Court of Appeals should be sustained, and the constitutionality of Paragraphs (B) and(C) of the Act specifically reaffirmed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE

FILED ON BEHALF OF DAY ENTERPRISES, INC. TRADING AS DAY'S CROWN: BOOTH'S, INC.; DONLAN ENTERPRISES, INC. and PLB INDUSTRIES, INC.

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December 17, 1977

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Day Enterprises, Inc. trading as Day's Crown, Booth's, Inc., Donlan Enterprises, Inc. and PLB Industries, Inc. hereby move, pursuant to Rule 42(3) of this Court, for leave to file the attached brief as *amici curiae* in support of the appellee. This motion is necessitated by the refusal of the appellants to consent to the filing of this brief.

The interest of the *amici curiae* group is set forth in detail in the brief. To summarize, however, *amici* operate independent gasoline service stations at four locations in Baltimore and Laurel, Maryland. The service stations are leased from their supplier, Crown Central Petroleum Corporation ("Crown").

Crown is the largest independent gasoline marketer in Maryland and enjoys approximately a five percent share of gallonage sales in Maryland. It possesses the fifth largest market share in Maryland of all gasoline marketers, including the major oil companies, being surpassed only by Exxon, American Oil, Shell and Gulf. Beginning in 1968, Crown began to sell its gasoline to independent dealers in multi-pump stations, selling gasoline and motor oil, unaccompanied by auxiliary services. However, Crown attempted to exercise rigorous control over the prices charged by its dealers for gasoline. As a consequence, in 1973 Crown was sued in the United States District Court for the District of Maryland by four dealers. On May 20, 1975, the United States District Court for the District of Maryland found that Crown had violated Section 1 of the Sherman Act by entering into illegal vertical agreements fixing the retail prices of gasoline in the Baltimore metropolitan area and by conspiring horizontally with competitors including Ashland Oil, Petroleum Marketing Corporation, Amerada Hess Corporation and Meadville Corporation in the fixing of retail prices of gasoline in the Baltimore metropolitan area. Phillips, et al. v. Crown Central Petroleum Corporation, 395 F. Supp, at 735, appeal pending. Subsequently, on June 1, 1976, an indictment against Crown, in addition to the other companies, was returned by the United States grand jury at Baltimore. After a three month trial, on August 30, 1977, Ashland, and PMC, appellants herein, as well as others, including Kayo, the marketing subsidiary of appellant Continental Oil Co., were convicted by a jury

in the United States District Court for the District of Maryland and subsequently were sentenced to the maximum criminal penalty provided by the antitrust laws. Crown and Continental were acquitted.

Recently, Crown caused all its existing dealer contracts and leases in the State of Virginia to be cancelled and announced its intention to convert existing gasoline stations in the State of Virginia to company-owned stations which will enable it effectively to control the retail pricing of Crown gasoline in that state. *Amici* believe in the event that the statute precluding company ownership of gasoline stations in Maryland is not upheld, Crown will endeavor to restore its control over the pricing of Crown gasoline in Maryland by terminating the leases of *amici* and the leases of other Crown dealers in Maryland and converting their stations to company-owned and operated stations.

Counsel for *amici* represented the plaintiffs in the *Phillips* litigation in the United States District Court for the District of Maryland and *amici* believe they are in a position usefully to supplement the legal arguments to be presented by the Attorney General of Maryland in support of the validity of the statute under attack by familiarizing this Court with the pertinent legal authorities and literature relating to the commercial setting against which the Maryland statute was enacted.

For these reasons, it is respectfully requested that the motion of these retail lessee-dealers in gasoline products to file a brief *amici curiae* in support of appellee be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE

FILED ON BEHALF OF DAY ENTERPRISES, INC. TRADING AS DAY'S CROWN: BOOTH'S, INC.; DONLAN ENTERPRISES, INC. and PLB INDUSTRIES, INC.

INTEREST OF AMICI CURIAE

The interest of *amici* has been set forth in the foregoing motion to file this brief.

STATEMENT OF FACTS

Amici Curiae are retail lessee-dealers in Crown Central Petroleum Corporation gasoline products. Their

supplier has been found, by the United States District Court for the District of Maryland, to have engaged in an unlawful horizontal price-fixing conspiracy with other competing suppliers of gasoline including appellants herein Ashland Oil, Inc. and Petroleum Marketing Corp., and also Amerada Hess Corporation and Meadville Corporation. *Phillips, et al. v. Crown Central Petroleum Corporation,* 395 F. Supp. 735 (D. Md. 1975), appeal pending.

Appellants Ashland and PMC and Kayo Oil Company; the marketing subsidiary of Appellant Continental Oil Co. together with Hess, Meadville and others were indicted on June 1, 1976 by the United States grand jury for the District of Maryland on similar charges of horizontal price-fixing in violation of Section 1 of the Sherman Act, a conspiracy involving approximately seventeen billion gallons of gasoline valued at some four billion dollars. (A companion civil suit was also filed.) *United States v. Amerada Hess Corp., et al.,* Crim. No. 76-0314 (D. Md., 1976) C.C.H., Trade Reg. Reporter ¶45076. The indictment charged that the defendants, from at least as early as 1967, until November, 1974, in the States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and the District of Columbia, "conspired to do, among other things, the following:

> a. Used . . . a clearinghouse for gasoline pricing information in order to coordinate price increases and to eliminate discounts and settle pricing disputes.
>
> b. Telephoned or otherwise contacted one another to exchange and discuss current and future retail gasoline prices.
>
> c. Telephoned or otherwise contacted one another to coordinate price increases.
>
> d. Telephoned or otherwise contacted one another to eliminate discounts in the form of price reductions or the granting of premiums.

> e. Telephoned or otherwise contacted one another to police the agreement and secure adherence to agreed upon increased prices; and
>
> f. Met . . . and discussed pricing strategy, including the coordinated increase of retail gasoline prices and the curtailment and elimination of price cutting and discount practices."

After a three month trial, on August 30, 1977, appellants Ashland, PMC, Kayo and others were convicted by a jury in the United States District Court for the District of Maryland and subsequently were sentenced to the maximum criminal penalty provided by the antitrust laws. Crown and Kayo's parent, Continental, were acquitted. These same three appellants, whose unalloyed beneficial effect in the marketplace seems open to question, seek now to invalidate a state law one of the effects of which is to protect the public from the maintenance or increase of control by them of retail gasoline pricing through the elimination of independent lessee-dealers.[1]

In the *Phillips* case, *supra*, the District Court found also that *Amici's* supplier Crown had engaged in unlawful vertical price-fixing by imposing upon its lessee-dealers resale prices chosen by Crown. In its opinion, the Court cited this Court's opinions in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951) and *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964) and noted:

> "A wholesaler like Crown must make a clear cut choice when deciding whether or not to switch from company operated to dealer operated stations. If such a company owns and operates its own

[1] Two other appellants (Gulf and Exxon) pleaded *nolo contendere* (and entered into consent decrees in allied civil cases) in *United States v. American Oil Co.,* Cr. 153-65 in the United States District Court for the District of New Jersey, a case involving alleged horizontal and vertical gasoline price-fixing in the States of New Jersey, Pennsylvania and Delaware.

> stations, it may itself set its retail prices without committing a per se violation of the Sherman Act. If it leases stations to independent dealers, it must leave the determination of the retail prices to the unfettered discretion of the dealers. *Coercion of any kind is not permitted, whether by written contract or oral threats, because a coerced agreement to fix prices cripples the freedom of traders and thereby restrains their ability to sell in accordance with their own judgment.*" 395 F. Supp. at 761 (Emphasis supplied).

Subsequent to the trial of the *Phillips* case, Crown threatened to terminate all its subsisting dealer contracts in the State of Virginia (E. 177) thereby restoring to itself the control over retail prices denied it by the Sherman Act where an oil company does business through independent dealers. Because of the effectiveness of Section (B) of the law under attack, Crown has been unable to do in Maryland what it planned in Virginia and has thus been unable to circumvent, in the marketplace, the effect of the judgment of the United States District Court for the District of Maryland in *Phillips v. Crown Central Petroleum Corporation.*

The factual materials supporting the judgment of the Court below may be summarized as follows:

A. *The statute was reasonable to promote retail competition, to prevent suppression of "price wars" and to prevent elimination of pressure on producers and refiners to lower wholesale prices.*

The determination by the General Assembly to limit the control by oil companies over retail prices in the gasoline industry was first indicated by its enactment of the Maryland Antitrust Act with its provisions, tracking those of the Federal Sherman Act, against both vertical and horizontal price fixing. See §11-201 of the Commercial Law Article of the Maryland Annotated Code, originally enacted by Chapter 357 of the

Acts of 1972. This general expression of concern with vertical price control in the gasoline industry was carried further when by Chapter 662 of the Acts of 1973, the General Assembly supplemented the Maryland Antitrust Act by enacting the Gasoline Products Marketing Act which was further strengthened by Chapter 852 of the Acts of 1974, enacted almost simultaneously with the law here under challenge. Chapter 854 of the Acts of 1974. Section 11-304C of the Commercial Law Article, part of that Act, provides that "the distributor [defined as a person who engages in the sale, consignment or distribution of gasoline products through retail outlets which he owns or leases] may not set or maintain or attempt to set or maintain the price at which the dealer sells any product, and the price of any product may not be subject to enforcement or coercion by the distributor in any way. However, the distributor may counsel with the dealer concerning prices and may suggest prices to him." The Revisor's Note to this section notes the legislature's intention to apply the provision "even in situations where the Maryland Fair Trade Act might otherwise permit the setting of resale prices" By Chapter 608 of the Acts of 1975 the divestiture provisions of Chapter 854 were revised to guard against evasion of them. Subsequently, by a Chapter of the Acts of 1976 the Maryland Fair Trade Act was repealed.

As long ago as 1948 it was urged that:

> "The key to an effectively competitive reform of the petroleum industry is therefore the separation of the major companies into separate units controlling their four chief functions, production, transportation, refining and distribution and the further horizontal division of some of the dominant units which would survive a vertical distribution of the great companies."

Rostow, *A National Policy for the Oil Industry* (1948) at 118. The same work then urged, nearly thirty years ago:

> "[E]xtending the principle of the commodities clause of the Hepburn Act to all common carriers, including pipelines and tankers. The commodities clause policy prohibiting the same business from operating in different lines, where such quality of operations might threaten the competitive character of either market — has been found desirable in other fields presenting comparable problems: in commercial and investment banking, in air, ocean and rail transport, in the relation of airlines to plane manufacturing, and in a variety of other cognate situation." Id. at 120.

The structure of the industry was described in 1948 as follows:

> "The tieing arrangements in the field of wholesaling have their counterparts at the retail level, both as to jobbers and service station outlets. Here the legal forms take on more variety and ingenuity, not alone because of the Clayton Act, but for other legal reasons: to avoid coverage under the National Labor Relations Act, the Fair Labor Standards Act, or the Social Security Act; to minimize income taxation or escape chain store taxes. It is now common to have the filling station nominally owned by its operator but controlled in fact by the major company supplying gasoline, through complicated double leases, or other elaborate procedures for avoiding the obvious.
>
> The net result is the organization of a vast market around the polarizing position of the major companies — five to sixteen in each consuming market, the modal number being eleven — selling a uniform and standardized product through tied outlets of various kinds, except for a small carefully watched flow of gasoline sold as private brands, and in part produced by independent refiners. The large forces of potentially independent and competitive units in the industry are thus mobilized into regiments wearing the uniform of one or another of the major companies. So

> equipped, they march in step, following the price policy of the major companies. The competitive potential of the market is transformed. Every member shares to a lesser or greater degree the profits of a monopolistic price policy. In fact, the market consists not of many separate dealers and jobbers, but of the few major company phalanxes combining large numbers of scattered sellers into effectively disciplined units." Id. at 75-76."

The recent antitrust proceedings have threatened the existence of these "phalanxes" by making independent dealers independent in fact as well as in name. Chapter 854 of the Acts of 1974 had as its purpose preventing the restoration of the earlier situation by preventing replacement of independent dealers by company-owned stations.

The writers of DeChazeau and Kahn, *Integration and Competition in the Petroleum Industry* (1959) at 298-99 perceived the existence of considerable competition in the retailing of gasoline, noting the breakdown at that time of the means by which major oil companies controlled retail pricing:

> "25 years ago the major oil companies not only owned but operated enough service stations so that their own retail price postings complimented and reinforced their price leadership at the wholesale level. . . . Today, instead, only a few integrated firms like Standard of Ohio and Standard of California own and operate any sizable number of stations. There are other ways — notable among them fair trading and consignment selling — by which refiners can exercise direct, legal control over the service station price; there has been increasing resort to such methods in recent years . . . Still it is generally the case that the retail prices are set by at least partially independent reactions of individual station operators to the prices charged by their competitors."

It has recently been noted that:

> "It seems to be sufficient from a control standpoint for the major oil companies to own most of the better locations and to use independent dealers to operate their facilities. Since the dealer does not own the location his bargaining power is practically nil and his behavior can be directed in large part by the actions of the major oil companies, which use a variety of techniques to bring about conformance to the operating procedures they feel to be important to their own performance. The key aspect of the major oil companies' control over their dealers' operations is the short term lease contract given dealers. Throughout the 1960's most dealers operated under one year lease contracts with 30 day cancellation clauses for infractions of the contract. The short-term nature of the contract puts dealers in the position where they realize that unless they generally operate in the manner prescribed by the major oil companies they run considerable risk of not having their contracts renewed when they expire. This gives the major oil companies considerable power since dealers often have big personal investments in time and effort building their businesses and also a financial investment in parts and inventory which are primarily of value to a going business."

Allwine and Patterson, *Competition, Ltd: The Marketing of Gasoline* (1973) at 46.

The period since 1973 has seen the breakdown of the consignment and fair trade devices by which prices might be partially controlled by oil companies as well as impairment of their control over dealers through short-term leases.[2] In consequence, there has been increased interest by the oil companies in company operation of gasoline stations. Enactment of Chapter 854 of the Acts of 1974 was a reasonable reaction by the

[2] Appellant Phillips Petroleum under pressure from the Federal Trade Commission has recently agreed to abandon use of this device and accord long-term leases to its dealers. CCH Trade Regulation Report ¶ 20716 (1974).

General Assembly to the possibility that competition at the retail level in the pricing of gasoline with its benefits to the consuming public, would be eliminated by this means.

Company witness after company witness in this action acknowledged that a major inducement to company operation of stations as distinct from operations of stations by independent dealers was not the greater economy of such operations but rather the fact that company operation made possible company control of the ultimate resale price. See the testimony of Mr. Harvin of Exxon (E. 340); the testimony of Mr. Chandler of Continental (E. 357); the testimony of Mr. Ferguson of Petroleum Marketing Corporation (E. 451-52) and the testimony of Mr. Luellen of Ashland (E. 508).

It was also clear that the state does not entertain delusions in believing that there was a real and present danger that an increasing number of major oil companies intend to supplant independent dealers by company operated stations. BP Oil Company converted all of the dealerships in the state to company operation in 1973 (E. 764). There was a statement in the record indicating that Appellant Gulf Oil Company had plans to phase in 22 company-owned stations in place of self-service stations (T. 252). An announcement by Crown Central Petroleum Company made part of the Motion of Amici Curiae for Leave to Appear in the Circuit Court (E. 177) indicated that Crown Central Petroleum Company had declared its intention to convert all its gasoline stations in the State of Virginia to company operation as a means of accomplishing resale price control denied it by the antitrust laws where dealer operation was utilized.

There was testimony in the record that BP, following the acquisition of its stations by Sohio, reproduced in

Maryland Sohio's characteristic methods of operation and that this example was being given careful consideration by other companies including Gulf and Exxon. Dr. Patterson, the expert witness called by the State, noted that one danger of integrated ownership of gasoline stations was that it permitted major oil companies to punish price competitors. Similarly the testimony of Mr. Luellen of Ashland made clear that when shortages of petroleum produces occurred, gasoline stations directly owned by the oil company were not placed on allocations although independent dealers and distributors purchasing from Ashland were told that if they exercised their prerogative to purchase elsewhere at lower prices they would not be resupplied by Ashland and were likewise placed on allocation (T. 425-27) (partially reprinted at E. 514).

The record below, a record almost entirely made by the oil companies themselves, amply revealed also that the legislature might reasonably believe that one effect of company operation of stations was to remove pressure upon oil companies to grant concessions at the wholesale level by removing pressure for voluntary allowances and other concessions from independent dealers. Thus in speaking of company operation Mr. Harvin of Exxon, after conceding (E. 328) that dealers could frequently make a profit where the company could not and that unprofitable company stores were frequently converted to dealer operation (E. 327-29) stated that company operation of stations nevertheless had countervailing advantages:

> "This strategy is economically attractive when we consider the influence of proper retail practices on our wholesale and down stream profits" (E. 329).

Similarly another witness, Charles J. Luellen, a group vice president of Plaintiff Ashland stated that non-controlled customers were viewed as less desirable because:

> "We have no contracts with them and there is no written contracts with them; and so those people can leave us at any time and frequently over the years they have left us for various reasons but most frequently to avail themselves of lower price . . ." (E. 504).

Mr. Luellen also testified that there were advantages to Ashland, a producer and refiner whose crude was acquired at a higher cost than that of other major oil companies, due to the ownership of controlled stations:

> "Q. Mr. Luellen what is the significance of the fact competitively to Ashland that during that period of time [of shortage] it experienced a crude cost disadvantage in the area of two to three dollars per barrel? A. Well, the penalty, of course, resulted in the fact that we had to attempt to get our prices up, our refined product prices up sufficiently to pass through that — those cost increases.
>
> Q. Now, Mr. Luellen, do company-operated stations permit Ashland to offset in part these disadvantages of crude acquisition? A. Yes sir. By protecting us from loss of substantial volumes of uncontrolled business." (E. 506).

Thus Ashland, for example, favors direct ownership of retail stations for a classic reason advanced by members of cartels — to protect itself, as a high cost producer, from erosion of its market share.[3]

One of the expert witnesses called by the Plaintiffs, John H. Lichtblau, similarly testified as to the desire of oil companies for controlled stations because of the

[3] Mr. Luellen also revealingly asserted that the competition faced by his company was not competition from major oil companies operating through dealers but from other oil companies marketing through company-owned stations at prices approximately 3 cents per gallon under the prices of major oil company dealer stations. The vigor of the competition pointed to by Mr. Luellen as justifying company operation is perhaps open to question, in view of the recent criminal price fixing convictions of petitioners Ashland, PMC, Kayo and others who do business, in whole or in part, through company-operated stations.

tendency of other accounts to demand price concessions. Controlled stations were said to be desirable because they "assure you of a continuous steady market" (E. 531). Uncontrolled stations and distributors by contrast were troublesome: "because of a fraction of a penny a gallon he may leave you and go to someone else" (E. 531). Mr. Lichtblau also revealingly testified that it was very difficult to trace the origins of price wars, that price wars sometimes permanently reduced prices, and that major oil companies (which of course have had to operate almost entirely with independent dealers hitherto) frequently start price wars (T. 472-74) (omitted in extract).

The most highly rewarded of Plaintiffs' extraordinary gallery of well rewarded witnesses, Professor Theodore Levitt of the Harvard Business School[4] acknowledged that company operation meant the elimination of potential price makers (E. 398) and that the number of independent competitors in a market had something to do with the outcome (E. 401-02) and that company owned stations meant there were fewer decision points (E. 401-02). Similarly Professor Charles H. Berry, another of Plaintiffs' experts, though perceiving no immediate danger in company operation of stations, acknowledged that a competitive market must have many competitors (E. 441). Yet another expert called by Plaintiffs, Professor Marcus of Rutgers, similarly noted that it was "very important to have a good number of participants" (E. 492).

[4] On being advised that Professor Marcus, a Shell witness, has received only $450 per day for his 25 or 30 days of service to the Plaintiffs (E. 483-84) Judge Childs observed "Professor Marcus, I realize it's not up to a judge to give advice, but if I might offer one suggestion, you might find it well to contact Professor Levitt's agent in the future." (T. 387). Professor Levitt received $1,600 per day for his 20 to 25 days of service (E. 391).

A leading study of the origins of gasoline price wars has noted the contribution of independent non-integrated gasoline dealers to them:

> "Conventionally, price rigidity is associated with the 'kinked' curve model. That is, it is held that members of an oligopolistic group are anxious not to disturb an existing equilibrium situation, and thus they will tend to maximize joint profits, and to divide these profits according to some predetermined arrangement. *Such a view implies either fully integrated or nearly perfectly coordinated channels.* However, non-integrated channels are only imperfectly coordinated, and the interdependence of price decisions involves not only a group of sellers at a single channel stage, but sellers in markets at various levels. Policy agreements within a channel are difficult to achieve, and there are many problems of determining demand and cost at various channel stages. Hence, it is difficult to arrive at a fixed channel price structure which might be acceptable to all channel members. Moreover, if a final agreement could be reached between each seller and his respective channel members, there is no assurance that the resulting price structures would be the same for each seller. Even if complete agreement could be reached, both among sellers and within their respective channels, the resulting equilibrium situation need not be stable. The case study has shown clearly that the behavior of some members of one seller's distribution channel may be sufficient to destroy an existing industry equilibrium situation."

Dixon, *Suppliers' Pricing Policies and Gasoline Wars in Pennsylvania* (1966) at 56-7 (emphasis added).

The testimony of Mr. Harvin of Exxon was likewise clear that his company planned increased use of company owned operations. He testified that the trend in recent years has been to multi-pump island stores with limited service (E. 306) in which the company makes the decisions as to what is offered (E. 307); that his company had commenced operation of company

operated self-service locations (E. 311) and that it sold gas obtained on exchange from BP through a newly established Alert chain (E. 334). The purpose of company operation of the Alert stations was price control since absent company operation "there are antitrust laws which would prohibit Exxon from being able to control the price of gasoline" (E. 340) Exxon intends to operate more self-service stations (T. 112) (omitted in extract).

Mr. Ferguson of PMC, who extolled the benefits to the public of company operated low-service stations, explained that benefit as follows:

> "We are approximately 2¢ below major brand competition. This varies of course, from station to station, but I think on an average we are probably 2¢ to 2.2. It might be 1.7 for the moment and I think that pricing in marketing is the thing at the moment, but so far, on the average I would say that we are from 1 to 2¢ below major competition and I mean to say those offering full service, bays, tire repairs, batteries and so forth. Since we don't offer this type of thing we are gas, easy in, easy out type of operation" (E. 451-52).

Although the oil companies were vociferous in their claims that this type of company operation was such a great benefit to the public that the Maryland General Assembly could not constitutionally take action which would limit company operation of gasoline stations, the General Assembly was certainly justified in reaching an opposite conclusion. Apart from the aforementioned result of the recent criminal case and the private civil case that preceded it, testimony of the oil companies' own witnesses, as noted, justified the General Assembly in a belief that permitting company operation would significantly reduce the number of price setting centers and active competitors in the market and would relieve pressures upon oil companies to reduce wholesale prices. The evidence presented by the oil companies was

also striking and clear that the use of self service and gas only stations was not an innovation pioneered by company operated stations. See the testimony of Mr. Harvin of Exxon (E. 313). Similarly it was conceded that the integrated companies making greatest use of company owned stations at best matched competition and were "price takers" rather than "price makers". See the testimony of Mr. Ferguson of PMC (E. 462), and Mr. Lichtblau, an expert witness called by Ashland (E. 530). The testimony of the state's expert, Professor Patterson, was to similar effect (E. 589-90, 629). He similarly testified that most innovations were by non-integrated marketers (E. 591-92).

Taken in all, even on a record made almost entirely by the oil companies, it is apparent that the General Assembly was justified in believing that the benefits of company operation by integrated refiners were offset by loss of a number of price setting centers in the market, reduced pressure by independent dealers on wholesale prices, the dangers (exemplified by the *Phillips* case and the recent indictment in Baltimore) that competition might be eliminated by means of conspiracies between a relatively small number of price setting companies, the fact that integrated refiners operating company owned stations have not been leaders in innovation and have been at best price takers rather than price makers, as well as the substantial evidence that dealer operation was, in general, a lower cost form of operation. The act requiring divestiture was a reasonable means of guarding against real dangers to competition which would arise from increased company owned operation.

B. *The legislation was reasonable as a means of limiting the possibility that company ownership of stations might be used to control the pricing practices of independent dealers.*

The utility of directly owned gasoline stations as a means of dealer control has long been recognized:

> "The major oil companies do not solely rely upon personal communication between the dealer and the sales representative to closely control dealer operations. Some companies set the pattern of operation for their dealer by actually competing with them through strategically located company operations. In such cases it becomes a matter of not only 'doing as I suggest' but 'doing as I do'. Two companies that use relatively large numbers of company operated stations that frequently set the pattern for the dealer operations are Standard Oil of California and Sohio."

(Allwine and Patterson, *Competition, Ltd: The Marketing of Gasoline* (1973) at 46-7.

Professor Patterson testified at trial:

> "The increased direct operation of service stations will first permit the immense windfall profits of the crude price increases of vertical integrated major oil companies to be focused more effectively on the price competitor" (E. 594).

Further:

> "The financial power of the integrated firm can be focused through those price supports on firms-non-integrated firms making trouble by cutting prices and trying to take a bigger share of the market (E. 596).

Dr. Patterson further testified as to the dangers of company operation which "creates a power to discipline by using specific price reductions in only those stations in face to face competition with the price marketers" (E. 608-10, 627).

Further, apart from such specific use of the power to reduce prices at company owned stations, permitting company ownership leaves dealers under the more general threat that, in the event that they do not comply with company pricing desires, their leases will be cancelled and a conversion to company operation of the sort undertaken by BP in Maryland and Crown in Virginia will follow.

C. *The legislature might reasonably believe that the availability of gasoline supply to independent "price marketers" would be reduced, to the detriment of competition, if company ownership of stations was permitted.*

All the expert witnesses were in general agreement that the integrated company-owned stations were at best price takers rather than price makers and that some of the most vigorous price competitors in any gasoline market are chains of stations not affiliated with a producer or refiner. Thus Mr. Ferguson of PMC conceded that it was his company's practice as an integrated company to match competition and not to lower existing levels of price (E. 462). Mr. Lichtblau, called on behalf of Ashland, made a similar concession with respect to the practices of that company (E. 530). A survey of major oil companies conducted by the Governor introduced in evidence by the state indicated that during the period of shortage following the oil embargo, the supply of gasoline to independent dealers and distributors by the integrated companies was dramatically impaired, while the flow of gasoline to stations owned by such companies was effected only to a limited degree, if at all (E. 698-704). The testimony of Mr. Luellen of Ashland with respect to the activities of his company during this period was to substantially similar effect (T. 425-27, partially reprinted at E. 514). The state's expert witness, Dr. Patterson, extolled the

role of independent marketers as promoters of price competition:

> "The sole source of price competition in the marketing of gasoline comes from the competition between types of marketers, namely the private brand and non-integrated marketers and the major brand marketers; and it is this intertype, between type, competition that the two paragraphs of the law tend to enhance" (E. 588-89).

Dr. Patterson further testified:

> "The major marketer has a heavy investment and a particular form of distribution, he is closely intertwined with his competition through exchange agreements and joint ventures. The nature of that form of competitive relationship is one which makes price competition too aggressive and in a sense self-defeating so that they would be motivated not to use price because of the structure of the market and their relationship would be by themselves. On the other hand the smaller less committed more flexible non-integrated private brand marketer finds that the principal weapon at his disposal is price and he understands his position as being one where he is probably able to get away with cutting price, not be clobbered immediately; and the result is that he finds in his situation price cutting the price to be a much more effective marketing instrument than either the integrated refiner marketer who sells at a discount but who doesn't try to extend that discount and the major brand marketer who finds that his situation is such that to use the price is self-defeating as a primary marketing competitive tool" (E. 589).

Dr. Patterson distinguished between the pricing conduct of independent marketers and the pricing conduct of integrated companies such as Ashland who are deficient in supply and accordingly dependent upon other oil companies for supply:

> "The integrated refiner marketers who are — who tend to market at a discount — also find it in their interest not to be aggressive in price. They tend to be, if you will, passive price takers. They are not rich enough, strong enough or adequately enhanced with economic rent from the crude level to justify the investment in branding and in the major kind of marketing, but nevertheless they are so closely interconnected with their major competitors that they find that aggressive price competition is not the most profitable route for them to take. They are too big, too interdependent to use price. The only marketer who can use price in this industry is the one who thinks he can get away with it by virtue of his independence and by virtue of his smallness and by virtue of his geographical diversity." (E. 590).

The 1974 statute contains no provisions which would in any way prevent marketers not affiliated with major oil companies from continuing to operate in the state. Such marketers as Penney, Sears, Fisca, Homes and Giant remain free to operate. As was conceded by Ashland's own witness, Mr. Lichtblau (T. 466), Mr. Patterson testified that the growth of company-owned major stations would tend to decrease the quantity of gasoline available on the "spot" market to independent marketers, thereby reducing their ability to compete and, to enter the Maryland market (E. 594, 627, 634-5, 637-39). This perception of the tendency of integrated companies to favor their own stations in periods of shortage at the expense of independent marketers was fully confirmed by the testimony of Mr. Luellen of Ashland and by the results of the Governor's survey.

Although substantial testimony was adduced by the oil companies as to the alleged ease of entry into the gasoline station business, it was conceded by Professor Berry, one of their economic experts, that vertical integration can be a barrier to entry by requiring a new entrant to the business to enter at two levels (E. 439), both marketing and refining.

Much stress was laid by the Plaintiffs on the fact that the statute as written might preclude "backward integration" by independent price marketers. However no substantial testimony was adduced as to the ease of such backward integration and the state's expert Dr. Patterson testified as to its unlikelihood (E. 639):

> "Operating a refining system without, you know, clear favorable access to crude is a tough proposition and it is not an attractive proposition that invites a number of investors to come it" (E. 639).

The General Assembly was entitled to believe that any hypothetical loss to competition from creation of a condition in which independent marketers would have to divest their stations if they opened refineries was more than offset by the loss to competition which would result from the reduction in the free supply available to independent marketers from increased company ownership of gasoline stations.

ARGUMENT

This case has been distinguished by the chameleon-like nature of the claims asserted by the plaintiffs. The case began as an action instituted in Maryland State courts predicated on the primary assertion that the acts under challenge were beyond the police power of the Maryland legislature. A variety of federal constitutional arguments were thrown in as makeweights and the absence of any significant federal due process question was all but conceded. Both the State trial court and the Court of Appeals of Maryland firmly rejected the contentions founded upon the commerce clause that are so strenuously advanced by plaintiffs in this Court.

Upon its arrival in this Court the police power-due process questions have all but disappeared, indeed only one of the plaintiffs raises them and the briefs of at least one other plaintiff impliedly concedes the frivolousness of the due process contentions under present

law (Brief of Ashland, et al., at 38). Both courts below found against plaintiffs on the commerce clause question (see Joint Appendix to Jurisdictional Statements) and their determinations come here freighted with the strong presumption arising from the so-called "two-courts rule", see Hart and Wechsler, *The Federal Courts and the Federal System* (1st Ed. 1953) at 1390-92. See also Robert L. Stern [of counsel for plaintiff Exxon, et al. here], *Review of Findings of Administrators, Judges and Juries,* 58 Harv. L. Rev. 70, 89-90 (1944). Appellants also sought to engage the interest of this Court by emphasizing in their jurisdictional statements claims founded upon alleged conflicts between the Maryland statute and the Robinson-Patman Act[5] which were the subject of summary judgment and not tried below.

[5] As it is acknowledged in brief of Plaintiff Ashland Oil, Inc. et al., Plaintiff Continental Oil Co. has refrained from challenging subsection (d) as in conflict with the Robinson-Patman Act.

None of the parties to these consolidated appeals challenge in this court the validity of the Maryland Act in its relation to the Federal Emergency Petroleum Allocation Act or the Lanham Act, questions raised by certain amici curiae. The Lanham Act question was not raised below and is raised here by an amicus, not a party. Although questions not decided below may be invoked by this court to uphold a lower court decision, see *Dandridge v. Williams,* 397 U.S. 471 (1970), and authorities there cited, such questions scarcely may be invoked to overturn a determination of a lower court, given the appellate nature of this Court's jurisdiction. Subsection (f) of the Maryland Act was as plaintiffs Exxon et al. concede (Brief of Exxon, et al. at 50) construed by the court below as having the same meaning as the Federal Emergency Petroleum Allocation Act and plaintiffs have therefore not questioned its validity here. The so-called Lanham Act question rests on a contention that the Act somehow protects the right to operate a system founded upon maintenance of a uniform resale price, an oft-rejected proposition. See *Puritan Sportswear Co. v. Shure,* 307 F. Supp. 377, 390-91 (W.D. Pa. 1969); *Sunbeam Corp. v. Wentling,* 192 F.2d 7 (3rd Cir. 1951); *Clairol, Inc. v. Gillette Co.,* 270 F. Supp. 371, 380 (S.D.N.Y. 1967).

It is not surprising, given the character of the response to the jurisdictional statement filed by the State, that this Court noted probable jurisdiction of this case, for the State's response constituted a response on the merits to the Robinson-Patman Act claims raised by plaintiffs. Further consideration will make plain to the Court what the State's brief did not, viz, that the Robinson-Patman Act question, interesting though it may be, is wholly unripe for decision. The commerce clause and due process claims are without substance. Affirmance of the judgment below is therefore plainly required.

I.

CONFLICT WITH THE ROBINSON-PATMAN ACT IS CLEARLY NOT ESTABLISHED ON THE PRESENT RECORD.

The Court below rejected plaintiffs' claims founded upon asserted conflict between subsection (d) of the Maryland statute and the Robinson-Patman Act and reversed the action of the circuit court summarily and without trial granting plaintiffs relief against enforcement of subsection (d) of the Act. The issues presented by the *Enterprise, Sun Oil, Sunshine Biscuit* and *Bargain Car Wash* cases are interesting issues but they are patently unsuitable for decision as abstract academic questions on a record such as that here.[6] It has been recognized at least since publication by Alexander Hamilton of the Federalist No. 32 that preemption by Federal enactments is not lightly to be found and that such findings require not:

[6] This is particularly so since, as pointed out in the State's brief, acceptance of the interpretation of the Robinson-Patman Act 2(b) defense tendered by plaintiffs, by legitimizing communication between competitors for "price validation", might seriously compromise the basic Sherman Act rule against horizontal price fixing. See *United States v. United States Gypsum Co., cert. granted* 46 U.S.L.W. 3182 (1977).

> "a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of sovereignty."

As there noted, state powers are to be held superseded only if continued authority in the State would be:

> "absolutely and totally contradictory and repugnant . . . I use these terms . . . to distinguish this . . . case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority."

This very language "absolutely and totally contradictory and repugnant" was invoked by the Court in *Goldstein v. California,* 412 U.S. 546, 553 (1973) as defining the contemporary preemption standard.

The Brief of Champlin Petroleum Company, et al., *amici curiae,* urges that there is applicable here not the constitutional standard of "actual conflict" outlined by Hamilton but a standard of "potential conflict" derived by the writer of that brief from the case of *Rice v. Santa Fe Elevator Corporation,* 331 U.S. 218, 231-32 (1947). The "potential conflict" standard of the Rice case however arose from what the Supreme Court referred to as "the special and peculiar history of the Warehouse Act" under construction there, the act containing an express provision to the effect that "the power jurisdiction and authority [of the Secretary] . . . shall be exclusive with respect to all persons". No such provision appears in the Robinson-Patman Act. Under these circumstances the applicable preemption standards are provided not by *Rice v. Santa Fe Elevator Corporation* but by a companion case decided by the Supreme Court on the same day in which the opinion of the Court was

also written by Mr. Justice Douglas, the author of the *Santa Fe* opinion. In *Rice v. Board of Trade,* 331 U.S. 247 (1947) the Court noted "there is not contained in the Commodity Exchange Act, as there is in the United States Warehouse Act, . . . a declaration by Congress that the system by which it has adopted for the regulation of trading on contract markets is exclusive of state regulation." (at 253). This Court therefore, concluded, in *Rice v. Board of Trade*:

> "Respondents' claim of supersedure is, therefore, premature. Until it is known what rules the Illinois commission will approve or adopt, it cannot be known whether there will be any conflict with the Federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the Federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it." (331 U.S. at 252-56).

What was said in the *Board of Trade* case by Mr. Justice Douglas for a unanimous court is in full accord with this Court's contemporary approach to preemption problems. In *New York State Department of Social Services v. Dublino,* 414 U.S. 405, 413 (1973) this Court stated:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."

This case is held by commentators to have eclipsed whatever remains of this Court's holding in the *Rice v. Santa Fe* case. See Comment, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 Columbia Law Review 622, 645-46 (1975). In *Jones v. Rath Packing Co.,* 340 U.S. 519 (1977) this court reaffirmed that "This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied not merely as they are written." (51 L. Ed. 2d at 614). The lack of any actual as distinct from potential conflict between the Robinson-Patman Act and the provisions of subsection (d) is patent here. Leaving to one side the fact that the Comptroller is accorded by the Maryland Act rule making power to clarify or mitigate any possible areas of conflict, the potential areas of conflict pointed to by plaintiffs seem far fetched in the extreme. The complaint that the state-wide voluntary allowance uniformity revisions of the Maryland Act may compel primary line price discrimination prohibited by the Robinson-Patman Act assumes that a state wide voluntary allowance would be characterized by the federal courts as a price discrimination rather than price reduction. It also assumes that such a reduction would give rise to injury in fact to competition, requisite to Robinson-Patman Act liability for primary line price discrimination. The similar contentions made with respect to secondary line price discrimination based on conflicts at state borders, assumes that such problems will in fact arise and that such problems will not be mitigated or offset by either regulations of the Comptroller or different tax levels in the two jurisdictions. Given the recognition by the Federal Trade Commission in a Robinson-Patman enforcement proceeding that "no matter what area may be chosen there will also be fringe or peripheral effects on the border line of such areas between customers within the area and customers without" *Pure Oil Company,* FTC Docket 6640 (1959), the potential for real conflict is theoretical in the extreme. It is also important to note that the legislative history relied by amici Champlin Petroleum

Company, et al. (at 18) relates to the circumstances in which a local manufacturer's sales to a local purchaser may be within the Robinson-Patman Act and not to the question whether state lines may be validly held to separate geographic markets where state regulations are different.

The very cases under the Robinson-Patman Act relied upon by plaintiffs make clear that a decision as to conformity or conflict with the act is improper on the present record. In *Bunty v. Shell Oil Co.,* 1972 CCH Trade Cases ¶74252 (D. Nev. 1972) there were extensive findings as to trade areas and as to the extent of allowances granted by competitors. *Covey Oil Company v. Continental Oil Company,* 340 F.2d 993 (10th Cir. 1965), *cert. denied* 380 U.S. 964 (1965) involved reversal of motions to quash subpoenas. The discovery requested was allowed on the basis that information as to facts in the market was necessary to adjudication of the Robinson-Patman claims. In *Belliston v. Texaco, Inc.,* 455 F.2d 175 (10th Cir., 1972), *cert. denied* 408 U.S. 928 (1972) the court recognized that there was need for actual information as to competing prices before a section 2(b) defense could be successfully invoked to a Robinson-Patman Act claim.

In the present case the plaintiffs seek to use section 2(b) of the Robinson-Patman Act as a sword, rather than as a defense, and attempt to assert its provisions in a factual vacuum.

This is not the first case to challenge a state act directed against price discrimination on the basis that it does not fully recognize defenses directly available under the Robinson-Patman Act. In *State of Wisconsin v. Texaco, Inc.,* 1961 CCH Trade Cases ¶71153, the Supreme Court of Wisconsin dealt with a similar challenge. The majority opinion in that case stated:

> "Conflict between the federal and state statutes, if any, cannot be considered in the abstract. . . . Until this court knows what the facts are, it cannot determine whether a conflict if any exists. The question of conflict is moot until it is presented in a factually concrete manner. Because of the alleged conflict with the Robinson-Patman Act it is of the utmost importance that the pertinent facts be brought as fully into the record as possible before a decision is reached . . . This state is not precluded from the exercise of its police power on the mere possibility that a conflict of jurisdiction exists with the federal government; such conflict must be factually verified."

Judge Fairchild, concurring, observed:

> "Let us assume that as Texaco claims there may be acts of price discrimination under circumstances such they would be unlawful under the Wisconsin regulation but lawful, by reason of the good faith meeting competition defense, under the federal act. Let us also assume that this is the type of conflict which must not exist under the supremacy clause. Texaco would avoid the conflict by suspending the entire Wisconsin regulation. It might, however, be possible to avoid it by suspending the Wisconsin regulation only as to transactions where the conflict exists. I am not prepared at this time, simply by looking at the face of the federal act, to say that the Wisconsin regulation is so disruptive of the objectives of the federal act, that it is wholly suspended and inoperative. Particularly because of the complexity of economic regulation, I prefer to reserve judgment until the record before us shows the type of price discrimination being practiced and the extent to which defenses available under the federal act and not under the Wisconsin regulation can be proved. Not only will the existence of any conflict then be made more clear, but the record will doubtless prove a better groundwork for evaluation of the substantiality of the conflict."

A decision invalidating state legislation under the supremacy clause is a decision affecting the constitutional distribution of powers between the national and state governments, and the counsels of restraint in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J. concurring) are fully applicable to it. In consequence of the summary judgment granted by the Circuit Court this Court has before it no factual record bearing on the Robinson-Patman Act issues nor the benefit of the expert testimony which the State was prepared to adduce at trial. Nor does this Court know what the terms will be of the implementing regulations to be adopted by the Comptroller of the Treasury of Maryland with respect to the Maryland Act, nor have any enforcement proceedings under the Maryland act with respect to prohibited price discrimination been commenced or threatened. Under these circumstances the claims of plaintiffs relating to preemption by the Robinson-Patman Act are clearly premature and unripe for decision.[7] Cf. Freund, *Umpiring the Federal System*, in *The Supreme Court of the United States* (Meridian Ed. 1961) at 109:

> "Review by the Supreme tribunal ought not be precipitate. Ordinarily it should await the development of a body of evidence illuminating the actual working of the laws in question."

[7] Even if the claims were upheld they would not affect the divestiture provisions of the act. The act is controlled by a severability clause (Code), Art. 1, §23 and the Maryland Court of Appeals at the close of its opinion strongly hinted that it regarded the provisions of the act as severable. The divestiture provisions of the 1974 act were repealed and reenacted with amendments by Chapter 608 of the Laws of Maryland 1975 which related to divestiture only, and thus now clearly stand separate from the price discrimination provisions.

II.

THE DIVESTITURE PROVISIONS OF THE ACT DO NOT VIOLATE THE COMMERCE CLAUSE.

A.

The Divestiture Provisions Are Not Unconstitutionally Discriminatory.

In rejecting the claim of unconstitutional discrimination against out-of-state businesses the Maryland Court of Appeals noted:

> "The Act is equally applicable to all producers and refiners. While oil is not produced in Maryland, and is not presently being refined in Maryland, there are producers or refiners which are Maryland corporations, or are headquartered here, or have substantial facilities here, or do a significant portion of their business here. All such 'Maryland' businesses are prohibited by the Act from operating retail service stations. If a refiner were to build refineries in Maryland, and were to engage in business solely within Maryland, it would be prohibited by the Act from marketing to a company owned station. On the other hand, out of state and Maryland retailers are treated the same. An out of state marketer not engaged in producing or refining may continue to market in Maryland to retail service stations operated with company personnel."

The Act does not discriminate between Maryland refiners and out of state refiners or between Maryland dealers and out of state dealers. As noted in the Brief of plaintiff Ashland at 8 note 9, as of July 1, 1974 there were 36 private brand stations in Maryland operated by 9 companies having no association with a refiner. These stations are undisturbed by the Act, and most of the companies operating them are non Maryland companies, such as Fisca Oil Co., Homes Oil Co., Pantry Pride and Sears, Roebuck & Company. See the testimony of John H. Lichtblau, an expert called by

plaintiff Ashland (E. 533-34). As is stated in the brief of Ashland:

> "Private brand stations are operated by several different kinds of companies. Some are mass merchandisers, such as discount and department stores and food chains. Others are wholesale jobbers, which distribute to retailers and also operate retail stations of their own. Still others are independent marketers, which sell only at retail and have no wholesale operations."

These three categories of private brand stations, many if not most of which are owned by non-residents of Maryland, are undisturbed by the Act. By contrast Crown Central Petroleum Company, according to the Fortune 500 survey the largest industrial corporation of any kind with headquarters in Maryland, is directly affected by the Act, as its brief amicus curiae makes clear, notwithstanding that "its corporate headquarters and principal offices [are located] in Baltimore, Maryland." (Brief of amicus curiae Crown Central at page 1.)[8]

[8] Although neither Crown nor any other oil company presently operates a refinery in Maryland, Crown has, within the last 5 years, proposed construction of refineries at Marley Neck in Anne Arundel County and Hawkins Point in Baltimore City; the Hawkins Point proposal is still under consideration. In addition Steuart Petroleum Company which abortively proposed a refinery in St. Mary's County, see *Steuart Petroleum Company v. Board*, 247 Md. 854 (1975), has proposed a refinery in Somerset County. Likewise, while there is no current production of oil in Maryland, the existence of substantial possible reserves in both Western Maryland and offshore has long been recognized. In consequence Maryland adopted a licensing law relating to oil production by Chapter 88 of the Laws of 1956 and joined the Interstate Oil and Gas Compact by Chapter 390 of the Acts of 1959, see Maryland Code Article 66(c), Section 675 through 689(c). There are a substantial number of oil and gas leases in Western Maryland, see *Bureau of Mines v. George's Creek*, 272 Md. 143, 151-52 (1974). Following this court's decision in *United States v. State of Maine*, 420 U.S. 515 (1975), the Department of Interior invited bids for oil leases off the Maryland coast, which are scheduled to be opened in early 1978, and Maryland by Chapter 673 of the Act of 1975 enacted a coastal facilities review act, Section 6-501 of the Natural Resources Article, relating to the imminent construction of crude oil pipe lines, production terminals and refineries. Given this widespread current interest in Maryland's oil resources by producers and refiners, the possibility of unreasonable regulations was clearly "alleviated by the operation of those critical restraints normally exerted when interests within the state are affected." *Southern Pacific Company v. Arizona*, 325 U.S. 761, 767 note 2, even apart from the fact that plaintiffs each and all have numerous employees in the state, Crown is a Maryland-based corporation, and plaintiffs Exxon and Shell, among others, appeared and testified at the legislative hearings (E. 729-54).

The case of *Hunt v. Washington State Apple Association*, 97 S. Ct. 2434 (1977) does not render the test of the constitutionality of legislative action an inquiry into the motives of the supporters of legislation. Cf. *Breard v. Alexandria*, 341 U.S. at 636, n. 20 (1949). Even if the case were otherwise, however, the legislative history of the Maryland Act makes clear that it was not the product of draftsmanship of dealers' associations but of initiative by the Governor and Comptroller of Maryland supported by studies undertaken by the executive branch of the Maryland government, as is recited in the opinion of the Court of Appeals.

The present act is founded on the premises that vertical integration extending to the retail level results in impairment of free processes of competition in consequence of (1) the more limited number of price setting centers at the retail level, (2) the ability which company ownership of stations confers upon producers and refiners to restrict their distribution of gasoline to stations whose price and practices they control, and (3) the ability which company ownership of stations gives producers and refiners to discipline independent competitors by selective price cuts at company stations in close proximity to competitors. The Maryland General Assembly considered that these ills resulted from

vertical integration irrespective of whether the producer or refiner was Maryland based or not Maryland based, and irrespective of whether refining was carried on in Maryland or out of Maryland. Contrariwise the General Assembly, seeking to insure that all service stations in Maryland were independent of producers and refiners, sought to protect the independence of all service station operations irrespective of whether their operators were Maryland residents or were not Maryland residents and benefited alike the resident of Virginia owning a service station in Maryland, Maryland residents owning a service station in Maryland and the national retail chains such as Sears Roebuck or Fisca owning a retail service station in Maryland. Legislation against vertical integration has long been commonplace at both state and national levels and acceptance of the warmly debated economic arguments for such legislation is not synonymous with a purpose to systematically discriminate against interstate trade.[9]

The contention that the act discriminates against interstate commerce because out of state producers and refiners engage in direct operation in order to gain a toe hold in the Maryland market is also highly unconvincing. Leaving to one side the fact that such direct operation requires capital investment not available to small producers and refiners, the fact remains that the Maryland legislature was not obliged as a matter of

[9] Plaintiffs Exxon, et al. endeavor to find discrimination in the requirement, added by the 1975 amendment to the divestiture law, that stations "must be operated by retail service station dealers". This requirement does not limit the operations of chains of stations by independent dealers or the residence of dealers operating stations and was designed, together with the preceding language prohibiting "operation by producers or refiners under a contract with any person, firm, corporation, managing a service station on a fee arrangement with the producer or refiner" to guard against evasion of the prohibition against producer or refiner operation and consequent price control by resort to contractual subterfuges.

constitutional law to regard this argument as decisive in the context of vertical integration any more than it is obliged as a matter of constitutional law to rescind its recent repeal of the Maryland Fair Trade Act because some manufacturers believe, not unreasonably[10], that legalized resale price maintenance would assist them in gaining a toehold in the Maryland market. Indeed the briefs of both plaintiffs Exxon, et al. (at 33) and plaintiffs Continental et al. (at 14) concede that Maryland's statute is sought to be stricken because it deprives plaintiffs of "the only way they can practically and legally maintain control over the pricing- . . . practices of their stations" (Continental brief at 14) and because it prevents end of a situation in which plaintiffs "legally . . . cannot control the price of the product sold" (Exxon brief at 33). The short answer to plaintiffs' cries of discrimination is that it does not constitute unconstitutional discrimination in violation of the commerce clause for a state to prohibit price fixing, by vertical integration or otherwise; on the contrary such prohibitions foster a free competitive market.

B.

THE ACT DOES NOT UNDULY BURDEN INTERSTATE COMMERCE

It is plain that the Maryland General Assembly in enacting the divestiture law sought to foster and not impair commerce. The General Assembly feared that allowing company operation would result in a drying up of supply to independent dealers particularly in periods of shortage, a conclusion supported by the Comptroller's report. It also quite reasonably feared a situation in which as a result of the developing practice of company operation which had commenced with

[10] See Telser, *Why Do Manufacturers Fair Trade?*, Vol. 3 Journal of Law and Economics 86 (1960).

actions by BP in Maryland (E. 726) and by Crown in Virginia (E. 177), a state of affairs would arise in which ultimate retail pricing of petroleum products in Maryland was controlled by 15 or 20 oil companies rather than by thousands of independent dealers or in which the pricing practices of company owned stations would be subject to control in order to affect the prices charged by neighboring independent dealers, and in which price wars which place pressures upon major oil companies to reduce wholesale prices of gasoline would be prevented. It has not hitherto been thought that state or federal measures designed to impair resale price maintenance by manufacturers or producers burden commerce. On the contrary, the assumption of this and other courts has been such prohibitions foster commerce. Federal legislation authorizing resale price maintenance has been given a narrow construction by this Court. See *Schwegmann Brothers v. Calvert Distilling Corporation*, 341 U.S. 284 (1951); *United States v. McKesson & Robbins*, 351 U.S. 305 (1956). Numerous decisions by this Court under the Sherman Act do not merely permit vertical divestiture as an antitrust remedy but in some circumstances decree it even where it has not been required by the lower court. Federal and state legislation requiring vertical divestiture has been upheld against challenges founded upon the commerce clause, as has federal and state legislation barring corporations, including foreign corporations, from various activities within states.

Both the brief of Exxon, et al. and that of Continental, et al. concede that a primary interest of the plaintiffs in invalidation of the present Act is the restoration of a legalized means of controlling prices charged at the retail level. (Brief of Continental at 14; Brief of Exxon at 33.) Exxon asserts this interest only vicariously, pointing to its importance to its competitors, Ashland and Continental. Continental and Ash-

land assert this interest directly. Amici curiae supporting them point to the "active competitive role" played by such companies. But the Maryland General Assembly may well have acted with proper scepticism with respect to such claims of active competition in light of the subsequent criminal conviction of Ashland, Continental's subsidiary Kayo and others. Seventy-one of the 95 gasoline stations affiliated with defendants convicted in the recent criminal antitrust case in Baltimore were company operated gasoline stations, these stations constituting nearly a third of the company operated stations in the State of Maryland (E. 189). In addition, amicus curiae Crown Central Petroleum Company, which, although acquitted in the criminal case, was found by a preponderance of the evidence in *Phillips v. Crown Central Petroleum Company*, 395 F. Supp. 735 (D. Md. 1976), to have participated in the same conspiracy, has converted all its stations to company operation in the State of Virginia, and has declared its purpose to similarly act in the state of Maryland. Under these circumstances Maryland's action will not constitute an undue burden on interstate commerce, but on the contrary was designed to prevent plaintiffs in this action from privately imposing such an undue burden.

The 'undue burden' cases relied upon by plaintiffs are cases in which legislation was designed to protect local interests and in which protection of such interests was held to impose an undue burden on interstate commerce. In the present case both elements present in these cases — protection of local interests and burden on interstate commerce — are absent. This is not a case like *Hood v. DuMond*, 337 U.S. 525 (1949) where the effect of a state regulation was to protect Wisconsin dairy farmers against competition from dairy farmers in Illinois and elsewhere by completely barring Illinois dairy farmers from the market, the legislation incidentally barring some Wisconsin farmers also. In the

present case out of state producers and refiners are in no way barred from the Maryland market. They remain free to sell their product in Maryland to independent dealers and retail chains of service stations in Maryland. The oil produced by the out of state producers and refiners may still cross the Maryland State line, unlike the milk produced by Illinois farmers involved in *Hood v. DuMond;* the effect of the Maryland regulation is merely to alter channels of distribution through which the oil is sold.[11]

The other cases relied upon in the 'undue burden' portions of plaintiffs briefs are also each cases of discrimination. In *Hunt v. Washington Apple Advertising Commission,* 97 S. Ct. 2434 (1977), the court stressed the fact that the North Carolina regulation prohibiting the display of apple grades requires the repacking only of out of state apples and thus "has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." Similarly, in *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977), the court also stressed the discriminatory effect of the enactment:

> "The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges . . . the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to her sister states."

[11] Indeed, given the fact that Maryland act does not require the oil companies to dispose of the real estate on which stations are located or the stations themselves, and does not prevent the oil companies from entering into dealership contracts with the company employees presently operating such stations, the practical effect of the Maryland legislation is for the most part merely to make paper legal changes the chief of which is impairment of the producers' and refiners' rights to engage in vertical price fixing.

The statute in *A&P Tea Company v. Cottrell,* 424 U.S. 366 (1976) involving a Mississippi law totally excluding milk from states not signing reciprocity agreements with Mississippi was similarly invalidated because of its discriminatory nature. The court laid stress upon the fact that the challenged regulation "in practical effect excluded from distribution in Mississippi wholesome milk produced in Louisiana" (424 U.S. at 375). Other objectionable features of the regulation, not present in this case, were the efforts by Mississippi "to force its own judgments as to an adequate level of milk sanitation on Louisiana" (424 U.S. at 380), thus projecting its public policy beyond its own frontiers, as well as the absolute nature of the exclusion of the Louisiana milk which was held to "invite a multiplication of preferential trade areas destructive of the very purpose of the commerce clause" (424 U.S. at 380). Similar observations apply to the case of *Polar Ice Cream v. State of Washington,* 375 U.S. 361 (1964) also relied upon by plaintiffs.

The present action is not controlled by these cases but by such cases as *Breard v. Alexandria,* 341 U.S. 622 (1951). There the court in sustaining an ordinance prohibiting door-to-door commercial solicitations notwithstanding that the fact that the ordinance bore most heavily upon businesses with no stores or permanent establishments within the state, noted that, as here:

> "The usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house to house canvassing is, constitutionally, immaterial and a matter for adjustment at the local level in the absence of federal legislation (341 U.S. at 638)."

The ordinance in *Breard* being nondiscriminatory and applying both to local and foreign solicitors, the fact that it directly regulated interstate commerce did not render it an undue burden, the rule of *Hood and*

Sons v. DuMond being limited to discriminatory regulations:

> "Nor does the clause as to alternatives apply to the Alexandria ordinance. Interstate commerce itself knocks on the local door. It is only by regulating that knock that the interests of the home may be protected by public as distinct from private action. Likewise in *Hood and Sons v. DuMond,* it was the discrimination against out of state dealers that invalidated the order refusing a license to buy milk to an out of state distributor. Where no discrimination existed, in a somewhat similar situation, we upheld the state regulation as a permissible burden on commerce. *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346. See in accord *Panhandle Leasing Pipeline Company v. Michigan Public Service Commission,* 341 U.S. 329.

The mere fact that a local regulation under the police power burdens interstate commerce more heavily than local businesses thus does not render it discriminatory or invalid. The suggestion by certain plaintiffs that present regulation constitutes a burden on interstate commerce because some companies cannot enter the Maryland market except by direct operation of stations is not only unsupported by the record but even if supported by it implies no constitutional violation. Any such inability is a function of a particular company's competitive weakness and not of state action. The Maryland market is open alike to local and foreign companies making sales through independent dealers and distributors including dealer and distributor chains. If Ashland or any other company is unable to penetrate the Maryland market thus made freely available because of asserted weaknesses in its images with dealers or public, Maryland is not constitutionally obliged to redress that deficiency by allowing internal vertical integration and thus compromising its policy in favor of intrabrand competition in the pricing of petroleum products and its policy against retail price

fixing of such products. Maryland was entitled to enforce its policies with respect to intrabrand competition even if the effect of these policies was to discourage the entry into the Maryland market of some companies that preferred to control prices down to the consumer level. Reliance upon Clayton Act Section 7 cases relating to the importance of competition waiting in the wings is misplaced. Section 7 of the Clayton Act is not part of the Constitution and to the extent its teachings are relevant the cases under it requiring vertical divestiture of gasoline stations by oil companies in some instances suggest congruence rather than conflict with Maryland state policy. See also *Federal Trade Commission v. Sun Oil Company,* 371 U.S. 505, 528 (1963) in which this Court recognized the legislative power to require vertical divestiture in this industry. Of a piece with plaintiffs' reliance on Section 7 Clayton Act cases are their reliance upon vague declarations in recent energy regulations of a national purpose to increase refinery capacity. The suggestion that such declarations preempt the states from passing valid police regulations is frivolous. The strength of such a policy while federally enacted price controls remain on the statute books may be doubted and the evidence of any impairment of such a policy by the Maryland Act is virtually non-existent.[12]

The contention that requiring divestiture of existing stations imposes an extraordinary burden not supported by any state interest is unfounded. The burden imposed by divestiture requirements is minimal. Re-

[12] It was asserted at trial that Hudson Oil Company, which operated stations in Maryland, would be deterred from creating new refinery capacity, or, more accurately, acquiring an existing refinery, by the divestiture provisions in the Maryland Act. Plaintiffs' briefs reveal that, notwithstanding the asserted discouragement by the Maryland Act, Hudson has in fact subsequently acquired a refinery. See Brief of Ashland, et al. at 16.

liance by plaintiffs on figures indicating the cost of their existing stations is misplaced, since the act in no way requires plaintiffs to sell either the land upon which stations are constructed or the facilities there situated, and accords the controller discretion to allow exemptions in hardship cases. The Act only requires that operation of the business be transferred to independent dealers; plaintiffs may continue to furnish petroleum products for sale at the same location. Effectuation of the policy of the divestiture statute requires not merely that acquisition of company owned stations be prevented *in futuro* but existing stations be divested. It was the purpose of the legislature to require intrabrand as well as interbrand competition, with its beneficial effect upon reduction of retail margins and pressure upon suppliers to reduce wholesale prices. This purpose would be frustrated if companies such as BP, Kayo (Continental) and Petroleum Marketing Corporation, the last two of which have been found guilty of horizontal and vertical price fixing involving their existing stations and all of which do nearly all their business in Maryland through company owned stations, were permitted to retain such stations. Similarly the danger that company owned stations at key locations might be utilized by other suppliers owning substantial numbers of such stations, such as plaintiff Exxon, in order to lead price movements in particular markets and punish disruption of "orderly marketing" by competitors was sufficient grounds for requiring divestiture of existing stations.

Grandfather clauses may be constitutionally permissible, but they impair the uniformity of legislation, inspire public disrespect for laws, and are in no sense constitutionally requisite, as numerous decisions of this Court sustaining divestiture provisions discussed in the last part of this Brief recognize.

The suggestion that the State, absent discrimination, was obliged to employ less restrictive alternatives is unfounded; see *Breard v. Alexandria,* 341 U.S. at 636-37; *South Carolina v. Barnwell Bros.,* 303 U.S. 177 (1939); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960), but in any event in the present case there are no less restrictive alternatives that could be deemed reasonably effective.

The state acted reasonably in considering that permitting vertical price control by contract or by ownership would foster horizontal price fixing; such an insight has been a major justification for interdiction of resale price maintenance of all kinds since the decision of this Court in the *Dr. Miles* case. The suggestion that the state should rely on its own antitrust laws to prevent the evil effects potentially resulting from use of company ownership of stations in support of horizontal price fixing conspiracies ascribes to the antitrust laws an effectiveness that they do not possess. Indeed the recent criminal convictions in Maryland in 1977 upon an indictment alleging a conspiracy which commenced at least 10 years earlier in 1967, took place in the Federal and not state courts, and were the outgrowth not of government investigation but of the highly unusual success of private dealers in private litigation in proving a horizontal price fixing conspiracy. Plaintiffs might prefer that the state rely upon its three-member antitrust division rather than the divestiture legislation enacted here to insure the maintenance of competition in the retail sale of gasoline in Maryland, but the state is clearly not constitutionally obliged to choose ineffectual methods of implementing a valid policy.

It is suggested in *Pike v. Bruce Church*, 397 U.S. 137 (1970), that the earlier "direct" and "indirect" burden tests as well as a candid balancing test, remain relevant. If this is so, it is clear that any burden imposed here

on retailing is an indirect burden. Indeed it may be questionable that this piece of legislation is properly even analyzable as a burden. In *Hughes v. Alexandria Scrap Company,* 426 U.S. 794 (1977) a majority of this Court expressly rejected the notion that "every action by a state that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially a burden." Where, as here, legislation is directed at the maintenance of competition and the prevention of price fixing and is nondiscriminatory in character, the characterization of it as a burden upon commerce at all may be inapt. Such a "burden" mode of analysis has not been pursued by the courts in analysing the application of state antitrust legislation and other divestiture statutes. See *Watson v. Buck,* 313 U.S. 387, 402 (1941); *Waters-Pierce Oil Company v. Texas,* 212 U.S. 86, 197 (1909); *National Cotton Oil Company v. Texas,* 197 U.S. 115, 129 (1905); *Hammond Packing Company v. Arkansas,* 212 U.S. 322, 343 (1909); Cf. *Washington v. Sterling Theatres Company,* 64 Wash. 2nd 761, 394 P.2d 266 (19); *Wisconsin v. Allied Chemical and Dye Corporation,* 9 Wisc. 2d 290, 101 N.W.2d 133 (19). As to divestiture provisions specifically, see *Crescent Oil Company v. Mississippi,* 257 U.S. 129, 135-36 (1921); *Paramount Pictures v. Langer,* 23 F. Supp. 890 (D. N.D. 1939) revd. as moot 306 U.S. 619 and the numerous cases discussed in the portion of this Brief dealing with due process questions. Even if divestiture laws are properly analyzed as burdens on commerce, some cases question whether a balancing test must be met for them to be valid. In *Proctor and Gamble Company v. City of Chicago,* 509 F.2d 69 (7th Cir. 1974), cert. den. 421 U.S. 978, in sustaining a Chicago ordinance against phosphate detergents drastically effecting the flow of commerce across state lines, Chief Judge Swygert, joined by Judges Fairchild and Cummings, observed, citing this Court's decision in *Brotherhood of Locomotive Firemen*

v. Chicago Rock Island and Pacific Railroad, 393 U.S. 129 (1968), sustaining the validity of the Arkansas full crew laws for railroads that:

> "there is some support . . . for the proposition that, once it is determined that the legislation is a reasonable means of achieving a nondiscriminatory legitimate goal it should be deemed constitutional and any further weighing process need not occur."

In the *Brotherhood* case this Court observed that, in conducting a weighing process and striking down the full crew laws on this basis, "the district court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the commerce clause." (393 U.S. at 136). In *American Can Company v. Oregon Liquor Control Commission,* 517 F.2d 691, 697 (Ore. Appellate 1974) it was observed that in the *Brotherhood* case this Court "recognized the inappropriateness of a weighing process in cases of noncomparable benefit and injury." This analysis was followed in *Soap and Detergent Assocation v. Clark,* 330 F. Supp. 1218 (S.D. Fla. 1971). In the *Proctor and Gamble* case the Seventh Circuit suggested an intermediate test: "if the burden on interstate commerce is slight, and the area of legislation is one which is properly of local concern, the means chosen to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates to the contrary by clear and convincing proof." In the present case both courts below have analyzed the evidence to reject the proposition that the legislation here imposes an impermissible burden on interstate commerce.

C.

The Act Is Not Invalid Because It "Affects Operations Of A National Industry"

The suggestion of plaintiffs' counsel that cases like *Wickard v. Filburn,* 317 U.S. 111 (1942), recognizing the almost plenary nature of the legislative power of Congress over interstate commerce, interdict Maryland from enacting a statute regulating oil company operations at the retail level is extraordinary. Although discussions of the Robinson-Patman Act questions in plaintiffs briefs are replete with references to the scholarly literature on the appropriate construction of the act, it is no accident that plaintiffs' interest in pertinent legal scholarship evaporates when the commerce clause questions are reached. The reason is not obscure: plaintiffs' propositions are unfounded in the law and the scholarly writing on commerce clause problems gives them no support at all. For, as Professor Freund has noted, in Commerce Clause interpretation:

> "Three interrelated problems are presented: the scope of the power of Congress; the extent of the power of the states in the silence of Congress, and the effect upon state power of an exercise of Congressional authority."

Freund, *The Supreme Court of the United States* at 20 (1949). Plaintiffs invite the Court to confuse its precedents bearing upon the first and the second of these questions. Nor is it a service to clear thought about these matters to cite, as do two of the briefs, *Wickard* and the cases under the antitrust laws holding that they extend to the gasoline industry as though they have any bearing upon the negative reach of the commerce clause with respect to questions, such as divestiture of gasoline stations, which have not been addressed by Congress. For it has been clear at least since *Cooley v. Board of Wardens,* 12 Howard 299, 319 (1851) that:

> "the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities . . ."

Although plaintiffs vaguely attempt to imply that the oil industry by virtue of its importance is susceptible only of national regulation, in other portions of their briefs they urge that the state has available to it less restrictive regulatory devices, such as the regulation of gasoline franchise agreements (but not of vertical integration by ownership) worked by the Maryland Gasoline Products Marketing Act, whose validity they concede. Nor have plaintiffs been heard to assert, at least recently, the invalidity of other state regulations of the gas and oil industry, such as those of the Texas Railroad Commission. Their proposition is that the oil industry is so susceptible of national regulation that the dormant reach of the commerce clause preempts all state regulation of which they disapprove. In *Cities Service Co. v. Peerless Co.,* 340 U.S. 179 (1950) this Court rejected a contention that the closely related natural gas industry could only be regulated by the national government.

In fact the case law recognizes that even as to industries which are within the regulatory powers of Congress, many transactions are presumptively local in nature so that non-discriminatory state regulations of them are not interdicted by the negative reach of the commerce clause. See *Head v. New Mexico Board of Examiners,* 374 U.S. 424, 430 (1965); *Florida Lime & Avacado Growers v. Paul,* 373 U.S. 132, 144 (1962) and the cases following them. In *Panhandle Eastern Pipeline v. Michigan Public Service Commission,* 341

U.S. 329 (1951) this Court observed "the sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause . . .". The Maryland Court of Appeals, quite appropriately, relied upon these and other cases in support of its proposition that earlier distinctions between local and national activity while no longer the test of congressional power to regulate activities under the commerce clause may still be of some significance in determining the reach of a state's authority absent congressional preemption. See *Cities Service Company v. Peerless Company,* 340 U.S. 179, 186-87 (1950); *South Carolina Highway Department v. Barnwell Brothers,* 303 U.S. 177 (1938); *Huron Cement Company v. Detroit,* 362 U.S. 440, 443-44 (1960); *Pike v. Bruce Church,* Inc., 397 U.S. 137, 142 (1970). Regulation of retail trade is assuredly one area that may be deemed presumptively local in character. Although it has been clear since the demise of the view of the commerce clause of *Schechter Poultry Corporation v. United States,* 295 U.S. 495 (1935), that powers of national regulation now extend to the retail trades, this Court has never said, with respect to any retail trade, that the negative reach of the commerce clause absent national legislation bars non-discriminatory state legislation.

Plaintiffs also have recourse to dicta in various opinions of this Court purporting to support the notion that state health and safety laws stand on a more favored footing than state laws regulating commerce for purposes of determining whether statutes are interdicted by the negative reach of the commerce clause. Although references to this approach occasionally reappear in court opinions, the approach has long since been discarded as a touchstone for decision. It is noted by Professor Freund:

> "No more workable have been the formalistic tests essaying a distinction between laws regulating commerce and those regulating health or safety. The state law limiting the speed at which an interstate train may travel is, to the pragmatic eye, a regulation neither exclusively of commerce nor exclusively of safety but is rather something of both, and we do not escape a hard question of judgment by converting the problem of accommodation to one of semantics." Freund, *The Supreme Court of the United States* (Meridian Edition, 1961) at 100.

The unreality of such distinctions was long ago noted by Professor Frankfurter, as he then was:

> "Commercial legislation and police legislation are not discrete processes. Their manifestations are not easily differentiated by judicial scrutiny. By no form of words does the court ultimately escape considerations not sharply different from those that are the concern of a legislature." Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (1937) at 52-53.

This is certainly true of the legislation involved here. Condemnations of price fixing are sufficiently embedded in our law and policy that state legislation aimed at its eradication may fairly be deemed to partake of a police as distinct from commercial character. The present legislation does not stand on the same footing as a state restrictive licensing law. Moreover, to the degree that state law is aimed at a dispersion of power over the market it implicates, as Mr. Justice Brandeis would have reminded us, social as well as economic interests. In *Fox v. Standard Oil Company,* 294 U.S. 87, 100 (1935) in sustaining a chain store tax bearing especially heavily on oil company owned service stations, Mr. Justice Cardozo observed:

> "[a] motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of

> trade Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence."

The effect of the present legislation is to interdict arrangements pursuant to which persons who would otherwise be independent businessmen are converted into producer or refiner employees. Such legislation is not outside the mainstream of policies against restraint of trade, with their concern for independence of traders, see *Kiefer-Stewart Company v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Northern Securities Company v. United States*, 193 U.S. 197 (1904) (Holmes, J. dissenting).

The complaint by the industry that it is a national industry burdened by varying state laws, if good, would invalidate numerous and varied forms of state regulation and taxation, many of them supported by the industry and not under attack here. The burdens assertedly imposed by diversity in state enactments relating to ownership of service stations are not onerous and to the extent that they exist they are the price of life under a system of federal rather than unitary government — a system which confers important political and economic benefits upon the plaintiffs here, as upon all citizens.

Cases involving holdings that industries are the subjects of exclusive federal regulation, beginning with *Gibbons v. Ogden*, generally have involved interferences with interstate transportation, and not state regulation of manufacturing, let alone of retail trade. Thus in *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945) the statute invalidated was a state train length law. In *Bibb v. Najavo Freight Lines, Inc.*, 359 U.S. 520 (1959) an Illinois statute requiring contour mud guards on interstate trucks was invalidated since it required interchange of mud guards at state lines "causing a significant delay in operation where prompt movement may be of the essence." Cases discussing the

negative reach of the commerce clause with respect to issues of state judicial as distinct from legislative jurisdiction reflect a similar development. The early case of *Davis v. Farmers Cooperative Equity Company*, 262 U.S. 312 (1923) quashing service of an extrastate cause of action against a corporation involved in interstate commerce on commerce clause grounds has been restricted by subsequent decisions to cases "where the defendant is a common carrier and the effect of the suit is actually to tie up carriage in interstate commerce of goods" Leflar, *American Conflicts Law* (1968 Edition) Section 37, citing *International Milling Company v. Columbia Transportation Company*, 292 U.S. 511 (1934) (Cardozo, J.) and *Standard Oil Company v. Superior Court*, 44 Del. (5 Terry) 538, 62 A.2d 454 (1948) appeal dismissed, 336 U.S. 930 (1949). Even as to the transportation industries, exclusivity of federal regulation is not lightly found. See *South Carolina v. Barnwell Brothers, supra; Huron Portland Cement Company v. Detroit, supra; Brotherhood of Locomotive Firemen v. Chicago Ry, supra.* Against this background the suggestion that the distribution of petroleum at retail is the subject of exclusive national regulation is simply frivolous.

III.

THE DIVESTITURE PROVISIONS DO NOT CONTRAVENE THE DUE PROCESS CLAUSE.

In believing that price fixing and other abuses at one level of distribution might best be guarded against by severing its ownership from that of higher levels of distribution, the General Assembly acted in a long and well established tradition. Numerous enactments, state and federal, requiring the severance and divestiture of differing sorts of businesses, some in the same chain of distribution, have been enacted, sometimes after sharp political controversy, and have been upheld by the Supreme Court of the United States and by other

Courts. Some of the most dramatic episodes of modern political history center on some of these enactments. The statutes embodying and upholding the principle include the Commodities Clause of the Hepburn Act, 49 U.S.C. §1(i) prohibiting railroad companies from transporting commodities manufactured, mined or produced by them; the so-called "Death Sentence" provision of the Public Utility Holding Company Act, 15 U.S.C. §79(K) requiring the divestiture by holding companies of the larger part of the public utility plant of the country; the provisions of the Federal Alcohol Administration Act, 27 U.S.C. §205, prohibiting the maintenance of so-called "tied houses" by distillers and producers of alcoholic beverages and analogous state laws; the provisions of the Glass-Steagall Act prohibiting national banks from underwriting securities and limiting the capacities in which they may purchase and sell securities (12 U.S.C. §24(7)); prohibiting national banks from being affiliated with entities engaged in the purchase, sale or underwriting of securities (12 U.S.C. §377) and prohibiting entities engaged in the purchase, sale or underwriting of securities from participation in the banking business (12 U.S.C. §§78 and 378); as well as Federal statutes barring airlines from allied transportation businesses (49 U.S.C. §1378). State statutes in the alcoholic beverage field and other state statutes precluding businesses engaged in cotton ginning from engaging or continuing to engage in related activities, requiring corporations to divest themselves of farm lands, and requiring producers and distributors of motion pictures to divest motion picture theatres have been upheld. The principal statutes and cases sustaining limitations upon vertical integration and programs of compulsory divestiture are considered hereafter in turn.

THE COMMODITIES CLAUSE OF THE HEPBURN ACT

During the Administration of President Theodore Roosevelt Congress enacted, after furious political controversy and in the fact of spirited lobbying by the nation's railroads, the Commodities Clause of the Hepburn Act, enacted by the Act of June 29, 1906 and now codified as 49 U.S.C. §1(8). That statute provides:

> "It shall be unlawful for any railroad company to transport * * * any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The statute came under immediate attack and was actually invalidated by divided decision of the United States Court of Appeals for the 3rd Circuit (*United States v. Delaware and Hudson Company* 164 Fed. 215 (3rd Circuit 1908).

The statute was defended by Learned Hand, then a member of the Bar, in a notable article in the Harvard Law Review, Hand, *The Commodities Clause and the Fifth Amendment,* 22 Harvard L. Rev. 250 (1909). The article noted that the Act was conceived as a remedy for rate discrimination just as the statute presently under challenge was conceived as a remedy for evils arising from vertical price fixing and its invitation to horizontal price fixing. To the objections of the railroads that the Act punished innocent and guilty railroads alike Hand observed:

> "The second defense for the Act is that it will prevent the commission of what would be conceded wrongs, but which are difficult of discovery or punishment. The facts are peculiarly within the carrier's knowledge. It is only by an inquisition that one can ascertain whether the service ren-

dered a shipper is all that he can fairly ask, and whether or not he is being oppressed either to give the carrier's trade the first facilities or to drive him to terms. It is of course true that to forbid the carrier from carrying his own goods may result in preventing much carriage which is quite innocent, and not within the purview of the Act at large. It is however by no means unheard of in our law, and therefore out of its 'due process', to forbid conduct which may be overt evidence of either an innocent or guilty act, but as to which it is difficult to know whether it is in fact one or the other. The curtailment of the liberty of the innocent citizen is justified by the prevention of wrongs which are impossible to detect. Thus we all know that the carrying of concealed weapons or the possession of burglarious tools or counterfeit money, or of game out of season, is each criminal, though all may be quite harmless in the individual case. On the whole there is reason to believe that they are not innocent in the majority of cases, and the State may prevent much wrong at the expense of little hardship. As in much other legislation, the result is determined by an account in which there is a debit, as well as a credit, column. Similarly, the purpose which justifies the statute of frauds depends upon the fact that the oral evidence accessible for contracts is doubtful and difficult to procure. Many good contracts go by the board that false contracts may not be foisted upon the citizen. His 'liberty' to make a valid oral contract is taken from him because he is protected in the end more completely." (at 256-57).

"In the case of the Commodities Clause the same reasoning applies. It is certainly not for the courts to say that the practice of transporting its own products by railroads does not lend itself to a violation of the law against discrimination, which it is impossible or difficult to detect; whether that danger is of enough importance to justify so drastic a measure as the total prohibition of the trade, would seem to be exclusively a matter for the legislature." (at 258).

With respect to the argument that as applied to railroads already possessing mining properties the statute would impair vested rights Judge Hand had this to say:

> "The gravamen of the defendant's appeal consists in the assertion that many millions of dollars of their property will be destroyed. Let us suppose that in an attempted compliance with the statute they distributed to their shareholders certificates of interest in coal lands, or coal shares, similar to the 'ore certificates' issued sometime since by the Great Northern Railway under no compulsion whatever. This would require the conveyance of title in the lands, or in the shares, to trustees, but the shareholders in the end hold the same proportionate interest in the coal through certificates as they did formerly through their ownership in the stock* the legal title of the property would by hypothesis pass from the carriers and be vested in trustees. The ultimate beneficial interest would remain the same. In the case of the Great Northern Railway no contest was made* — or at least none was made in good faith — when the change took place. It was recognized as a legitmate method of internal management and no one considered that his 'property' had been effected. It may be that such a distribution would affect the value of the securities; but it is important to remember that some of the decrease in value may be the measure of that very advantage of discrimination and of ultimate monopoly which it is the purpose of the Acts to destroy. Insofar as the fall in such shares reflects the popular estimate of the loss in the carriers' ability to market their coal upon more advantageous terms then independent shippers, and to control all the supply, in just so far, the 'property' so 'taken' consists only of their practical security from detection in the commission of crimes. That is a 'property' which the court cannot consider".

The statute here under attack does not even require the oil companies to divest the real estate on which their stations are situated or even the physical plant of

the stations themselves; they may comply either by sale or by lease to independent dealers.

In fact, the Third Circuit decision criticized by Judge Hand was shortly thereafter reversed by the Supreme Court of the United States in *United States v. Delaware and Hudson Company,* 213 U.S. 366, 415, 53 L. Ed. 836 (1909). In rejecting the due process clause claims the Supreme Court observed:

> "We think it necessary to consider at length the contentions based upon the due process clause of the fifth amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause, interpreted as the government construed it. For the purpose of our consideration of the subject, it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criteria by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause, as construed by the government, is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappears as a result of the construction which we have given the statute."

In the subsequent case of *Delaware Railway Company v. United States,* 231 U.S. 363, 58 L. Ed. 269 (1913) the Supreme Court disposed of the argument that the statute was invalid insofar as it sought to regulate the activities of railroads in private businesses then not subject to federal regulation, the mirror image of the

plaintiff's argument here that the State may not by regulating retail activities within its control affect producing or refining activities beyond its borders:

> "The Commodities Clause* does not take property nor does it arbitrarily deprive the Company of the right of property. The statute deals with railroad companies as public carriers and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning the carriers so as not to interfere with them as miners or merchants* the Commodities Clause was not an unreasonably and arbitrary prohibition against a railroad company transporting its own useful property but a constitutional exercise of the governmental power intended to cure or prevent the evils that might result if in hauling goods in or out the company occupied the dual and inconsistent position of public carrier and private shipper* the statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented."

The "Death Sentence" Provision of the Public Utility Holding Company Act

15 U.S.C., §79(K) was enacted in 1935, after heated controversy. The statute empowered and required the Securities Exchange Commission as soon as practicable after January 1, 1938 to require each utility holding company to take such actions as the Commission found necessary to limit its operations to a single integrated public utility system and other businesses reasonably incidental to it and to permit additional integrated public utilities systems to be controlled only if each of the additional systems could not be operated as an independent system without the loss of substantial economies and all of such additional systems were located in one state or in adjoining states or in an adjoining foreign country and the continued combina-

tion of such systems was not so large as to impair the advantages of localized management. It was the Commission's unqualified duty to require the dissolution of systems not located in one state or in adjoining states or in a contiguous foreign country. The statute was sustained by this Court, which noted:

> "In fashioning the remedy decreed by Section 11B1 Congress was following a pattern set many years ago by decisions applying the Sherman Antitrust Act, Northern Securities Company v. United States 193 U.S. 197 48 L. Ed. 679 Standard Oil Company v. United States 221 U.S. 1 55 L. Ed. 619 Continental Insurance Company v. United States 259 U.S. 156 66 L. Ed. 871 and the Commodities Clause of the Hepburn Act, United States v. Lehigh Valley Railway Company 220 U.S. 257 55 L. Ed. 458 United States v. Delaware Railway Company 238 U.S. 516 69 L. Ed. 1438." (327 U.S. at 707).

With respect to the claim that the statute contravened vested rights the Court stated:

> "The constitutionality of Section 11B-1 is also questioned from the standpoint of the due process clause of the fifth amendment. North American argues that this section, by compelling it to divest itself of its scattered subsidiaries to confine its operations to the single intergrated system, involves a taking of property without just compensation. It is also claimed that such evils as were found to exist in public utility holding companies find an adequate remedy in other sections of the Act and that Section 11B1 is therefore inappropriate. Neither contention is meritorious. The contention also is made that the fact that Section 11B1 requires disposition of security holdings and termination of relationships which antedate the passage of the act is fatal to its validity. But it merely requires that such holdings and relationships shall not continue in the future. There is no punishment for past offenses. Certainly there is no constitutional requirement that the status quo be maintained. See United States v. Trans Missouri

> Freight Association 166 U.S. 290, 342 41 L. Ed. 1007, 1028. The taking of property is said to involve 'a vast destruction of values'. Reference is made in this respect to the valuable right of North American's shareholders to pool their investments and thereby obtain the benefit alleged to flow from efficient common management of diversified interest. The Congress balanced the various considerations and concluded that this right is clearly outweighed by the actual and potential damage to the public, the investors and the consumers resulting from the use made of pooled investments. Under such circumstances whatever value this right may have does not foreclose the protection of the various interests which Congress found to be paramount. See Northern Securities v. United States 193 U.S. 197 48 L. Ed. 679.* Under Section 11C holding companies are given at least a year to comply with an order of the Commission under Section 11B. The Commission is also authorized to extend the time for an additional year upon a proper showing."

North American Company v. Securities and Exchange Commission, 327 U.S. at 708-710.

The provisions alluded to in the North American case as moderating the effect of the statute are strikingly similar to the provisions of the Act here under challenge. The statute here under challenge was effective July 1, 1974 but did not purport to require divestiture until July 1, 1975 and then requires divestiture not of real or personal property but only of operation of stations. Moreover, Article 56, Section 157E(G) provides that the Comptroller "may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer operated station." Furthermore, Article 56, Section 157E(H) provides that:

> "The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts

and reaching reasonable conclusions based upon those facts."

This provision for delay in the event of hardship is no less specific than and indeed is more generous than the provisions of Section 11C of the Public Utility Holding Company Act which limited permissible delay to one year.

The subsequent case of *American Power and Light Company v. Securities and Exchange Commission* 329 U.S. 90, expressly sustained the provision delegating to the Securities and Exchange Commission the delay power conferred upon it by the Act. The vague language used in the Act relating to "unduly complicated corporate structures and inequitable distributions of voting power" was held sufficient "even standing alone" (329 U.S. at 104). The Court observed "these standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest', 'just and reasonable rates', 'unfair methods of competition' or 'relevant factors'. The approval which this court has given in the past to those standards thus compels the sanctioning of the ones in issue. See *New York Central Securities Corporation v. United States* 287 U.S. 12, 24, 25, 77 L. Ed. 138, 145, 146; *Yakus v. United States,* 321 U.S. 414, 419-427, 88 L. Ed. 834, 845-848." (329 U.S. at 105).

The Appellants here can scarcely have the Court believe that the words "relevant factors" announce a proper standard under the rule in the *American Power and Light Company* caase but the words "relevant facts" in Article 56, Section 157E(H) somehow declare an improper standard.

Indeed the *American Power & Light Company* case allowed the Commission to proceed on a case by case basis. In the present instance the Comptroller has declared his intention to proceed by promulgating regulations:

"Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case by case methods, the Constitution offers no obstacle." (329 U.S. at 106).

The decisions of the Supreme Court in the *North American* and *American Power and Light Company* cases were not casual holdings. The controversy over the Act and its validity was a controversy that engulfed the country. "According to its defenders, the holding company was necessary to bring operating companies capital and credit; it was necessary to bring operating companies skilled management; and it was necessary because compulsory dissolution under the 'Death Sentence' would destroy the funds innocently invested in holding companies by millions of Americans, largely (apparently) widows and orphans." Schlesinger, *The Politics of Upheaval* (1960) at 308. The position of those favoring divestiture was the position usually taken by advocates of statutes such as those at issue here: that the dimensions of the interests sought to be regulated and the possibilities for abuse inherent in them rendered impossible effective regulation by any means short of the restoration of competition through a divestiture proceeding. Absent divestitute, the draftsman of the Public Utility Holding Company Act observed: "It is just a mere problem of arithmetic. How much money have you against how much money? How many good lawyers have you against how many good lawyers? Those are the actualities of the regulatory process — the drip, drip, drip of pressure and influence; the outmaneuvering, the outbraining, which will simply make it impossible to handle these aggregations of power." Id at 309 (quoting Thomas G. Corcoran, Jr.).

Exclusion Of Airlines From Related Businesses

49 U.S.C. Section 1378 makes it unlawful unless approved by special order of the Civil Aeronautics Board "for any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties or any substantial part thereof of any air carrier" or, conversely, for any "air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties or any substantial part thereof any person engaged in any phase of aeronautics otherwise than as an air carrier." Section 1378 (A)(7) makes it unlawful "for any person to continue to maintain any relationship established in violation of any of the aforegoing subdivisions of this subsection." This statute has been applied in numerous cases. See *North American Airlines, Inc., v. Civil Aeronautics Board* 240 F.2d 867 (D.C. Circuit 1957) *Continental Southern Lines v. Civil Aeronautics Board* 197 F.2d 397 (D.C. Circuit 1952); see *Hughes Tool Company v. Trans World Airlines* 409 U.S. 363 (1973).

The Federal Alcohol Administration Act

27 U.S.C. Section 205, the tied-house provision of the Federal Alcohol Administration Act is a provision which finds its analogies in many state laws, See deDanahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry,* 7 Law and Contemporary Problems 665, 667 (1940); Note, *A Comparative Survey of Post Repeal Liquor Legislation,* 83 U. Pa. L. Rev. 510, 518 (1935). The statute prohibits anyone engaged in business as a wholesaler of distilled spirits, wine, or malt beverages from directly or indirectly or through an affiliate inducing any retailer to purchase such

products to the exclusion of products sold by other persons through the use of enumerated means:

> "(1) by acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied or used by the retailer in the conduct of his business" among other practices.

The statute has been frequently applied without any question of its constitutionality. See, e.g. *Levers v. Anderson,* 153 F.2d 1008 (10th Cir. 1946). Similar state laws have been upheld. See *Lever v. Cornelius,* 72 Wash. 129, 129 P. 911 (1913) and cases following it.

The Glass-Steagall Banking Act

The Glass-Steagall Act of 1933, enacted immediately after the 1933 Bank Holiday to divorce the businesses of commercial and investment banking contained numerous provisions of a character similar to that of the statute at issue here. 12 U.S.C. Section 24(7) barred national banks from underwriting securities and limited the capacities in which they might purchase and sell securities, the statute being equally applicable to banks engaged in these activities prior to its effective date. 12 U.S.C. §377 prohibited banks from being affiliated with entities engaged in the purchase, sale or underwriting of securities from engaging in the banking business. 12 U.S.C. §78 prohibited interlocking directorates between national banks and businesses engaged in the purchase, sale or underwriting of securities. The statute has been construed and enforced by the courts and its provisions have been read sympathetically and broadly, its constitutionality remaining unquestioned. See *Board of Governors v. Agnew,* 329 U.S. 441 and more recently *Investment Company Institute v. Camp,* 401 U.S. 617 (1971) holding the sale of mutual investment funds by banks to be

violative of theAct.[13] See also 12 U.S.C.A. §1843(a)(2) (Bank Holding Company Act of 1956).

STATE LAWS RELATING TO ACTIVITIES OF COTTON GINS

In *Crescent Oil Company v. Mississippi,* 257 U.S. 129, (1921), the Supreme Court upheld a Mississippi statute which prohibited corporations, domestic or foreign, from owning or operating any cotton gin where such corporations were interested in the manufacture of cotton seed oil or cotton seed meal. Affected corporations were permitted to operate their gins "for a reasonable period until they may be sold" (257 U.S. at 132). The Act was upheld against challenge that it burdened interstate commerce and that, being, applicable to corporations only, it violated the equal protection clause. The contentions relative to interstate commerce were rejected. On the Equal Protection Clause question, the Court observed:

> "Whereas we have found in this case that the foreign corporation has no federal right to continue to do business in the state and whereas no contract right is involved and there is no employment by the federal government it is the settled law that a state may impose conditions in its discretion upon the right of such a corporation to do business within the state even to the point of excluding it altogether* and in such case the inherent difference between corporations and natural persons is sufficient to sustain the classification making restrictions applicable to corporations only. This would be sufficient to dispose of this second contention but we may add that the law assailed was enacted by the State in the exercise of its

[13] An effort has been made by some of the plaintiffs to suggest that the preceding cases are inapplicable because they involved wholly or partially regulated industries. However, the fact that an industry is already subject to public control against monopolistic abuse would logically seem to weaken rather than strengthen the case for divestiture statutes resting on the premise that divestiture is necessary to prevent such abuse.

> police power to prevent a practice conceived to be promotive of monopoly, with its intended evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the fourteenth amendment, and also that every state of fact sufficient to sustain such a classifications can be reasonably conceived of as having existed when the law was enacted will be assumed."

The opinion of the Supreme Court in the *Crescent Oil case* has been approvingly cited by the Court of Appeals of Maryland in *Yarger v. State,* 175 Md. 220, 230 and, even more pertinently, in *Brooks v. State Board of Funeral Directors* 233 Md. 99 (1963). In that case, the Court of Appeals, in sustaining a statute prohibiting corporations from engaging in the practice of funeral directing noted that:

> "The sweep of the Liggett[14] case was already limited by the action of the Supreme Court in Markmann Funeral Home, Inc. v. Ryan 300 U.S. 639* 81 LED 855. There the Supreme Court dismissed an appeal from a decision of the Supreme Court of Pennsylvania* sustaining as applied to a Delaware corporation a statute almost identical with the one involved in this case. In so doing, the Supreme Court cited Crescent Cotton Oil Company v. Mississippi 257 U.S. 129, 137* 66 LED 166, where the court had sustained as applied to a foreign corporation already engaged in doing business within a state a statute prohibiting corporations interested in the manufacture of cotton seed oil from operating cotton gins. That statute, moreover, unlike those in Liggett, Markmann and the instant case, did not contain a grandfather clause permanently protecting the interests of existing corporations." (195 A.2d at 735).

[14] *Liggett Co. v. Baldridge,* 278 U.S. 105 (1928), overruled in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973).

State Statutes Requiring Divestiture Of Farm Land By Corporations

A North Dakota statute prohibited and continues to prohibit corporations from owning farm land in that state, other than land owned as a necessary part of a non-farming business. Corporations owning such land were required to divest it over a ten-year period. The statute was sustained by a unanimous Supreme Court against attack on commerce clause, due process, equal protection and vested rights theories in *Asbury Hospital v. Cass County,* 326 U.S. 207, 211-12 (1945), the court declaring in emphatic terms:

> "The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it. Horn Silver Min. Co. v. New York, 143 U.S. 305, 312-315, 36 L. Ed. 164, 156, 168, 12 S. Ct. 403, 4 Inters. Comm. Rep. 57; Hooper v. California, 155 U.S. 648, 652, 39 L. Ed. 297, 298, 15 S. Ct. 207, 5 Inters. Comm. Rep. 610; Munday v. Wisconsin Trust Co. 252 U.S. 499, 64 L. Ed. 684, 40 S. Ct. 365; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 137, 66 L. Ed. 166, 171, 42 S. Ct. 42. While recognizing the unqualified power of the state to preclude its entry into the state for these purposes, appellant points out that the state has permitted it to enter and to invest its money in obligations secured by mortgage on land within the state, in consequence of which it lawfully acquired the land free of restrictions. Appellant argues that the state may not, by later legislation, force a sale of the land thus innocently acquired, under conditions which do not allow recovery of the original investment. But a state's power to exclude a foreign corporation, or to limit the nature of the business it may conduct within the state, does not end as soon as the corporation has lawfully entered the state and there acquired immovable property. Subsequent * legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process. Hammond Packing Co. v. Arkansas, 212 U.S. 322, 342, 343, 53 L. Ed. 530, 540, 541, 29 S. Ct. 370, 15 Ann. Cas. 645, supra; see also Baltic Min. Co. v. Massachusetts, 231 U.S. 68, 83, 58 L. Ed. 127, 133, 34 S. Ct. 15. Similarly, this Court has upheld legislation imposing burdens greater than those to which such corporations were subject at the time of their entry on the ground that the state might exclude them altogether at a later date. Fire Assoc. of Phila. v. New York, 119 U.S. 110, 31 L. Ed. 342, 7 S. Ct. 108; Horn Silver Min. Co. v. New York, 143 U.S. 305, 36 L. Ed. 164, 12 S. Ct. 403, 4 Inters Comm Rep. 57, supra; see also Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 66 L. Ed. 166, 42 S. Ct. 42 supra; Lincoln Nat. L. Ins. Co. v. Read, 1944 Term, decided June 11, 1945 [325 U.S. 673, 89 L. Ed. 1861, 65 S. Ct. 1220]. Appellant, even if its activities in North Dakota are now restricted to the ownership of farm land within the state, stands in no better position to invoke the protection of the Fourteenth Amendment. The total exclusion of a corporation owning fixed property within a state requires it to sell or otherwise dispose of such property. Appellant must do no more. While appellant is not compelled by the present statute to cease all activities in North Dakota, the greater power includes the less.
>
> Since the state may validly require appellant to sell its farm land, the contention that the statute is wanting in due process because conditions have been such since its enactment that appellant has been and will be unable to salvage an investment made more than ten years before raises no substantial constitutional question. The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of sale."

The statute was again upheld in 1971 in *Coal Harbor Stock Farm, Inc. v. Meier,* 191 N.W.2d 83 (N.D. 1971).

State Legislation Requiring Divestitute Of Motion Picture Theatres By Motion Picture Producers

Perhaps the decided case most closely in point on the issue presented in the present case is the decision of the United States District Court for the District of North Dakota in *Paramount Pictures v. Langer* 23 F. Supp. 890 (D.N.D. 1938) sustaining the constitutionality of a statute prohibiting the operation of motion picture theatres owned, controlled, managed or operated in whole or in part by producers or distributors of motion picture films, or in which producers or distributors have any interests. The statute was sustained both as applied to future opening of theatres and to require the divestiture of some ten theatres already owned by the producers in the State. The significance of the case as a precedent is no way altered by the fact that the statute was subsequently repealed by the North Dakota legislature resulting in the subsequent reversal as moot of the order of the District Court, 306 U.S. 619 83 L. Ed. 1025. The case, notwithstanding that it was tried in North Dakota, was argued on both sides by eminent counsel from outside the State and received national attention. See Comment, *Enforced Independence for Motion Picture Exhibitors,* 48 Yale L.J. 339 (1938). It was decided by a three judge District Court. In the course of a comprehensive opinion the court stated, on the commerce clause and due process issues:

> Some of the issues presented for determination can be eliminated without lengthy discussion.
>
> * * *
>
> It seems clear to us that any remote effect that the Act might have upon the distribution of films in interstate commerce or upon the rights of

> producers or distributors under the Copyright Law could not sustain a conclusion that the Legislature of North Dakota had invaded a field exclusively reserved to the Congress of the United States. As to interstate commerce, see Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 426, 56 S. Ct. 513, 515, 80 L. Ed. 772; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 135, 136, 42 S. Ct. 42, 43, 66 L. Ed. 166.
>
> (2) We see no merit in the contention that the Act can not be justified as a measure intended to safeguard the public health, safety or morals, because (1) there is no basis for believing that the operation of affiliated theatres in the State has, or will have, any reasonable relation thereto, and (2) any indirect effect which the presence of these 10 affiliated theatres in the State might possibly be conceived to have on the health, safety and morals of their patrons would not warrant excluding them from the State. * * *
>
> * * * * * *
>
> The vital and controlling question in these cases, as we see it, is whether the Act is violative of the due process clause of the Fourteenth Amendment in that it has no reasonable relation to the prevention of monopoly, restraints of trade, unfair competition, unfair trade practices, or the maintenance in North Dakota of a free and open market for motion picture films, in which market all exhibitors may compete on a substantially equal basis. * * *
>
> This Act did not originate from conditions peculiar to North Dakota, but grew out of a nation-wide controversy of long standing between independent or unaffiliated motion picture exhibitors and those producer-distributors who had entered the exhibition field through acquiring theatres or interests in theatres in theatres. The independent exhibitors, through their trade association, caused the Act to be drafted, and sponsored it before the North Dakota legislature. Its introduction in the legislatures of other states was procured, but apparently North Dakota is the first state which has adopted it. * * *

We have no doubt, however, that a state legislature for the purpose of shaping its laws and of guarding against evils which have, or which it may reasonably believe have, developed elsewhere, may look beyond the boundaries of its own state. See Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 527, 57 S. Ct. 772, 778, 81 L. Ed. 1193, 112 A.L.R. 293; Hammond Packing Co. v. Arkansas, 212 U.S. 322, 343, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645.

The power of a legislature to deal with practices and situations which may reasonably be conceived to be promotive of monopoly and restraints of trade, is not subject to question. National Cotton Oil Co. v. Texas — 197 U.S. 115, 129, 25 S. Ct. 379, 49 L. Ed. 689; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 137, 42 S. Ct. 42, 44, 66 L. Ed. 166.

In these cases the plaintiffs deny that they have suppressed local competition or attempted to control prices, and their main attack upon the Act in suit is that it violates due process. In the respects pointed out, these cases differ from the Crescent Cotton Oil Co. Case, but there is evidence in the record here which justifies an inference of suppression of local competition in states other than North Dakota by producers having affiliated theatres; and the evidence also discloses the existence of the power and the temptation of such producers to engage in practices promotive of monopoly and restraint of trade.

It is our opinion that the existence of unusual power to deal with competitors unfairly, when coupled with the opportunity and the temptation to use that power, is probably a sufficient basis for legislative action to prevent the possibility of its exercise. This must certainly be so where there is, in addition, evidence of past aggressions.

[l]egislative as well as judicial action to curb what may honestly be believed to be monopolistic tendencies can be based upon a reasonable and justified fear that a powerful corporation or group

of corporations possessing the power to unjustly handicap competitors, and faced with the temptation to use that power, may do so if not prevented.

The Legislature of North Dakota apparently had before it all of the facts and circumstances which tended to show that the combining of production, distribution and exhibition of motion pictures created advantages which no independent exhibitor could possess, and placed those who had combined these three branches of the industry in a position to destroy or injure competition. The Legislature also apparently had before it the facts which the producers contend indicate that, even if they have these advantages, they have not used them, and that the market for motion pictures is still virtually a free and open market. We think that the question of the necessity of a law to prevent the coming into existence in North Dakota of unfair competitive practices asserted to have occurred elsewhere and of restraints of trade in the business of exhibition of motion pictures was a matter for the Legislature to decide, and that its determination of this question, under the circumstances, is conclusive upon this Court.

The fact that the Act here in question was passed primarily in the interests of a class would not render it invalid. In Nebbia v. New York, *supra*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469, the state statute there under consideration dealt primarily with those engaged in a single industry. The same was true in the case of Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 56 S. Ct. 453, 80 L. Ed. 669. There can be no doubt of the right of a state, within constitutional limits, to protect and foster any industry within its borders and to pass reasonable legislation in the interests of its citizens who are engaged in that industry. Moreover, in the Nebbia Case (pages 524, 525 of 291 U.S., page 510 of 54 S. Ct.) the Supreme Court pointed out that "no exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of

the citizen which will not to some extent abridge his liberty or affect his property."

Our conclusion is that the policy declared by the Act in suit has a reasonable relation to a proper legislative purpose.

There is, no doubt, force in the plaintiffs' contention that the Act goes beyond the necessities of the situation with which the Legislature was dealing. As already pointed out, the plaintiffs had operated 10 theatres in the State for some eight years. It can reasonably be believed that an act which would have prevented the operation of any more affiliated theatres in the State would have served every useful purpose. Such a law, however, might have been challenged on the ground that it was subject to the same infirmity as the statute which was held invalid in Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S. Ct. 457, 80 L. Ed. 675, for discriminating between those entering a business before April 10, 1933, and those entering the business afterwards. However that may be, the Legislature was certainly primarily the judge of what means should be used to secure the enforcement of the economic policy which it had adopted. Had there been no affiliated theatres in the State, the Act prohibiting the operation of any affiliated theatre could hardly have been regarded as harsh or oppressive. If it was within the police power of the State to exclude affiliated theatres before any had come into existence, it was within its power to prevent the operation of such theatres after they had come into existence. The fact that the theatres here involved were acquired before their operation was forbidden could not limit or restrict the police power of the State. Mugler v. Kansas, 123 U.S. 623, 669, 8 S. Ct. 273, 31 L. Ed. 205. Moreover, while this Act deprives the plaintiffs Minnesota and American of the right to operate their theatres in North Dakota so long as Paramount has any interest in them, it does not in reality destroy the value of the investment nor take away the right to operate the theatres as theatres if Paramount shall divorce itself from any interest in them.

Laws requiring the divorcement of certain classes of business are not a novelty in this country. Congress has prohibited carriers from transporting coal produced by companies in which the carrier has an interest. United States v. Delaware & Hudson Co., 213 U.S. 366, 29 S. Ct. 527, 53 L. Ed. 836; United States v. Lehigh Valley R. Co., 220 U.S. 257, 31 S. Ct. 387, 55 L. Ed. 458. Congress has exercised the power (delegated it to a commission) to require certain corporations engaged in interstate commerce to divorce themselves of stock in subsidiary corporations. Federal Trade Commission v. Western Meat Co., 272 U.S. 554, 47 S. Ct. 175, 71 L. Ed. 405. The State of Mississippi, as already pointed out, enacted a law to prevent corporations engaged in manufacturing cotton-seed oil and meal from operating cotton gins. Crescent Cotton Oil Co. v. Mississippi, supra, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166. The State of Arkansas passed an act, Acts Ark. 1905, p. 1, providing that corporations engaged in a combination or trust outside the State should not do business within the State. Hammond Packing Co. v. Arkansas, supra, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645. These enactments have been sustained. Congress recently enacted laws separating the business of banking and investment. 48 Stat. 162, 188, 12 U.S.C. §377, 12 U.S.C.A. §377. By the Public Utility Holding Company Act of 1935, 15 U.S.C. §79 et seq., 15 U.S.C.A. §79 et seq., Congress provided for the disintegration of the public utility holding company systems. States have passed legislation divorcing the businesses of banking and investment, and laws prohibiting manufacturers and wholesalers of whisky from engaging in or having any interest in liquor retail stores. Grain warehousemen are forbidden in Illinois from engaging in grain trading. Central Elevator Co. v. People 174 Ill. 203, 51 N.E. 254, 43 L.R.A. 658.

That we might be of the opinion that the Legislature of North Dakota could have dealt adequately with the problem sought to be solved by this challenged legislation in some different or more moderate way, would not justify us in striking down this Act as being harsh and unreasonable. If

the subject matter of the legislation was within the legislative authority, the policy declared and the means of its enforcement were, within very broad limits, for the Legislature to decide.

CONCLUSION

The economic realities underlying the effort made by the Maryland General Assembly in seeking to limit control by the oil companies over the retail pricing of gasoline by excluding them from the ownership of retail gasoline stations have long been recognized. In *Fox v. Standard Oil Company*, 294 U.S. 87, 79 L. Ed. 780 (1935) Justice Cardozo, speaking for the Supreme Court in sustaining a chain store tax bearing especially heavily on chains of gasoline stations owned by oil companies noted that:

> "The effect of multitudinous agencies, reaching into every corner, and yet subject to regulation at a center, is to fix a uniform retail price to which independents must conform as the price of their existence. They are independent in name only, for the chain sets the pace, and even in competing they are subject to its mastery." (294 U.S. at 99).

In recognition of the existence of this economic reality where producers and refiners of gasoline are permitted to directly engage in its retail sale, the General Assembly enacted Chapter 854 of the Acts of 1974. Its action in so doing was reasonable and must be sustained.

Respectfully submitted,

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December 17, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Motion for Leave to File a Brief of Amici Curiae and Brief of Amici Curiae were mailed, this 17th day of December, 1977, to J. Edward Davis, Esquire, Weinberg & Green, 10 Light Street, Baltimore, Maryland 21202; Lawrence S. Greenwald, Esquire, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, 1200 Garrett Building, Baltimore, Maryland 21202; Lewis A. Noonberg, Esquire, Piper and Marbury, 2000 First Maryland Building, 25 South Charles Street, Baltimore, Maryland 21201; David Ginsburg, Esquire, Ginsburg, Feldman and Bress, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006; Wilbur D. Preston, Jr., Esquire, Whiteford, Taylor, Preston, Trimble & Johnston, IBM Building, 100 East Pratt Street, Baltimore, Maryland 21202; William Simon, Esquire, Howrey & Simon, 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006; and to The Honorable Francis B. Burch, Attorney General of Maryland, One South Calvert Street, Baltimore, Maryland 21202.

GEORGE W. LIEBMANN

FOR ARGUMENT

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO FILE TARDY AMICUS CURIAE BRIEF FOR THE STATE OF CALIFORNIA

AND

Brief of the State of California as Amicus Curiae

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The State of California moves this Court for leave to file tardy *amicus curiae* brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States.

INTEREST OF THE STATE OF CALIFORNIA

Like the State of Maryland, the State of California recently enacted a statute relating to price discrimination in the sale of motor vehicle fuels and oils.[1] (California Bus. & Prof. Code §§ 21200-21203, which is reproduced in Appendix A to the *Amicus Curiae* Brief.) The California statute prohibits price discrimination in the sale of motor vehicle fuels and oils in language virtually identical to Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). (Cal. Bus. & Prof. Code § 21200.) Unlike the Maryland statute, the California statute contains a "meeting competition" defense, under which an oil company may discriminate in price if the lower price was made in good faith to meet an equally low price of a competitor ". . . and was also offered to any other of his purchasers in competition with" the favored purchaser. (Cal. Bus. & Prof. Code § 21200.) Thus, the California statute allows the meeting of competition on a "competitive area" basis instead of on a state-wide basis as required by the Maryland statute.

The United States District Court for the Northern District of California, the Honorable Lloyd H. Burke presiding, struck down the California statute in June 1976 as in irreconcilable conflict with the Robinson-Patman Act, 15 U.S.C. § 13, in a suit brought by Shell Oil Company (one of the appellants in the instant case) and joined as

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1. The California statute, unlike the Maryland statute, covers only price discrimination, and does not, for example, prohibit company-operated stations. This *Amicus Curiae* Brief is limited to the Supremacy Clause issues arising from state price discrimination statutes.

amicus curiae by three other oil companies (one of which, Exxon Corporation, is an appellant in the instant case). *Shell Oil Company v. Evelle J. Younger (Attorney General of the State of California)* No. C-75-2691 LHB (N.D. Cal.) Order of June 11, 1976. A copy of this decision is reproduced as Appendix B to the *Amicus Curiae* Brief. The decision is also reported at 1976 CCH Trade Cases ¶ 60,960.

On appeal, the United States Court of Appeals for the Ninth Circuit granted an expedited hearing and took the appeal under submission on June 8, 1977. In an order filed December 27, 1977 and received by the California Attorney General's office on December 30, 1977, the Ninth Circuit, *sua sponte*, vacated submission of the appeal "pending a decision by the Supreme Court of the United States in *Exxon Corp. v. Maryland, review granted* 46 U.S.L.W. 3184 (October 3, 1977)." A copy of the Order is attached as Appendix C to the *Amicus Curiae* Brief. Upon receipt of the Ninth Circuit order, the California Attorney General's office requested copies of the briefs in the instant case from the Maryland Attorney General's office. Copies of the briefs were received on January 16, 1978. The instant motion for leave to file a tardy *amicus curiae* brief was made as soon as possible.

Thus, California seeks to file an *amicus curiae* brief because the decision in the instant matter will substantially affect the disposition of a related case concerning the constitutionality of a California statute on the same subject as the Maryland statute. It is extremely important that California be able to express its views on the preemption issue because this Court's decision will probably establish guidelines for federal courts, such as the Ninth Circuit in particular, to follow in deciding whether a state statute is preempted by the Robinson-Patman Act. Without hearing California's views, this Court might inadvertently announce

a rule dispositive of the California case, which involves a different statute on the same subject as Maryland's. In addition, California seeks to file an *amicus curiae* brief concerning questions of law not adequately covered by the parties.

RELEVANT QUESTIONS OF LAW NOT ADEQUATELY COVERED BY THE PARTIES

California wishes to present for this Court's consideration a point of view not presented by the parties but incorporated into the California statute: the meeting of competition on a "competitive area" basis. The "competitive area" approach—an approach in between the oil company's "spot pricing" approach and Maryland's state-wide pricing approach—insures the supplier substantial price flexibility by allowing the oil companies to meet local competition on a "competitive area" basis without injurious and unfair price discrimination between competing dealers. In so doing, the California "competitive area" approach preserves the benefits of competition which the parties herein each contend the opponent's approach destroys.

An issue preliminary to the preemption issue but not adequately covered by the parties is the scope of the meeting competition defense of Section 2(b) of the Robinson-Patman Act. The oil company appellants urge the 2(b) defense should be "tailored to an individual situation." (Appellants' Brief of Exxon Corp., Phillips Petroleum Co., Shell Oil Co. and Gulf Oil Corp. [hereinafter Exxon *et al.* Br.] at 58.) This interpretation would allow the oil companies to use Section 2(b) as a "sword" to create the very injurious price discrimination sought to be eliminated by Section 2(a) of the Robinson-Patman Act. California submits the Section 2(b) defense is properly construed as requiring the meeting of competition in the oil industry on a "competitive area" basis. The legislative history of

Section 2(b) clearly demonstrates that Congress did not intend to allow a seller to meet competition in an *unnecessarily discriminatory* fashion. *See* 80 Cong. Rec. 9418 (1936), quoted in *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 754 fn. 2 (1945), as dispositive of Congressional intent in enacting Section 2(b). The California interpretation also avoids the (unnecessarily) anticompetitive consequences of the meeting of competition in the oil industry on a "spot" basis, as recognized by this Court in *FTC v. Sun Oil Co.*, 371 U.S. 505, 523 (1963).

The adoption of the "competitive area" approach in the oil industry would eliminate the preemption issue as to the California statute, and would affect the preemption issue as to the Maryland statute.

If Section 2(b) of the Robinson-Patman Act is interpreted to permit the meeting of competition on a "spot" basis, then a Supremacy Clause issue must be addressed as to which state statutes the Robinson-Patman Act preempts. This is the second issue not adequately covered by the parties which California seeks to brief. California argues that states may enact price discrimination laws more stringent than the Robinson-Patman Act if the state law furthers the fundamental, overriding aims of the federal statute. Maryland has not adequately covered this issue.

The oil companies' preemption argument is premised on their claim that Section 2(b) of the Robinson-Patman Act gives them an absolute right to meet competition. California's brief establishes that no such absolute right to meet competition is conferred by the Robinson-Patman Act, a point not adequately covered by appellees' brief.

Both parties discuss the interrelationship of Section 2(b) with the Sherman Act. (Exxon *et al.* Br. at 80-8; Appellees' Br. at 58-64.) Maryland raises the problem that price verification prompted or required by Section 2(b) of the

Robinson-Patman Act exposes sellers to price fixing liability under Section 1 of the Sherman Act. The California "competitive area" approach avoids this thorny problem.

CONCLUSION

The State of California seeks leave to file a tardy *amicus curiae* brief: (1) to protect its own interests in a similar case concerning the validity of a California statute prohibiting price discrimination in the oil industry, the submission of the appeal of which case has been recently vacated by the Ninth Circuit pending decision in this case; (2) to influence any guidelines this Court may establish for deciding whether state statutes are preempted by the Robinson-Patman Act; (3) to insure that this Court not inadvertently rule (possibly incorrectly) on California's case; (4) to argue questions of law not adequately covered by the parties; and (5) to insure that the Court not be misled by the parties' presentation of an "all or nothing" approach to meeting competition under the Robinson-Patman Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

Brief of the State of California as Amicus Curiae

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In the Supreme Court of the United States

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Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

Brief of the State of California as Amicus Curiae

INTEREST OF AMICUS CURIAE

The State of California respectfully submits this brief *amicus curiae* pursuant to Supreme Court Rule 42(3).

The State of California, like the State of Maryland, recently enacted a statute concerning price discrimination

in the sale of motor vehicle fuels and oils. (California Bus. & Prof. Code §§ 21200-21203, which is reproduced in Appendix A hereto.) The California statute prohibits price discrimination in the sale of motor vehicle fuels and oils in language virtually identical to Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). (Cal. Bus. & Prof. Code § 21200.) Unlike the Maryland statute, the California statute contains a "meeting competition" defense, under which an oil company may discriminate in price if the lower price was made in good faith to meet an equally low price of a competitor ". . . and was also offered to any other of his purchasers in competition with" the favored purchaser. (Cal. Bus. & Prof. Code § 21200.) Thus, the California statute allows the meeting of competition on a "competitive area" basis instead of on a state-wide basis as required by the Maryland statute.

The United States District Court for the Northern District of California, the Honorable Lloyd H. Burke presiding, struck down the California statute as in irreconcilable conflict with the Robinson-Patman Act, 15 U.S.C. § 13, in a suit brought by Shell Oil Company (one of the appellants in the instant case) and joined as *amicus curiae* by three other oil companies (one of which, Exxon Corporation, is an appellant in the instant case). *Shell Oil Company v. Evelle J. Younger (Attorney General of the State of California)* No. C-75-2691 LHB (N.D. Cal.) Order of June 11, 1976. A copy of this decision is reproduced as Appendix B hereto. The decision is also reported at 1976 CCH Trade Cases ¶ 60,960.

On appeal, the United States Court of Appeals for the Ninth Circuit, *sua sponte*, vacated submission of the appeal "pending a decision by the Supreme Court of the United States in *Exxon Corp. v. Maryland, review granted* 46

U.S.L.W. 3184 (October 3, 1977)." A copy of this order, filed December 27, 1977, is attached as Appendix C hereto.

California files this *amicus curiae* brief because the decision in the instant matter will substantially affect the disposition of a related case concerning the constitutionality of a California statute on one of the same subjects as the Maryland statute. (The California statute, unlike the Maryland statute, covers only price discrimination, and does not, for example, prohibit company-operated stations.) This *amicus curiae* brief is limited to the Supremacy Clause issues arising from state price discrimination statutes.

QUESTIONS PRESENTED

1. Whether Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), should be construed as requiring the meeting of competition in the oil industry on a "competitive area" basis rather than on a "spot" basis in order to further the basic purpose of the Act, to prevent the anticompetitive consequences of the meeting of competition on a "spot" basis, and to further Congressional intent not to allow the meeting of competition in an unnecessarily discriminatory manner.

2. Whether competition in the oil industry is promoted by the meeting of competition on a "competitive area" basis or a "spot" basis.

3. Whether (even if Section 2(b) of the Robinson-Patman Act is not construed as requiring the meeting of competition in the oil industry on a competitive area basis), the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevents the oil companies from meeting competition on a "spot" basis.

4. Whether, assuming *arguendo* the Robinson-Patman Act is construed to permit the meeting of competition on a

"spot" basis, a state may enact a price discrimination law containing a more stringent meeting competition defense than contained in the Robinson-Patman Act as long as the state law furthers the fundamental, overriding purpose of the federal statute.

5. Whether Section 2(b) of the Robinson-Patman Act confers an absolute right to meet competition on a "spot" basis.

SUMMARY OF ARGUMENT

The meeting competition defense of the Robinson-Patman Act should be construed to require the meeting of competition in the oil industry on a "competitive area" basis, not on the "spot" basis urged by the oil companies. The meeting competition defense is an exception to the fundamental, overriding purpose of the Robinson-Patman Act, *i.e.*, to prohibit price discrimination between competing customers of the same supplier. As an exception to the Act's basic purpose, the meeting competition defense should be strictly construed to further the basic purpose of the Act. In advocating a liberal construction of the meeting competition defense, the oil companies seek to use the defense as a "sword" to create the very injurious discriminations the Act prohibits.

The "competitive area" approach is in accordance with Congressional intent not to allow the meeting of competition in an *unnecessarily discriminatory* manner. *See* 80 Cong. Rec. 9418 (1936), quoted by this Court as dispositive of legislative intent in enacting Section 2(b) in *FTC v. Staley Mfg. Co.*, 324 U.S. 746 (1945), at 754, footnote 2. The "competitive area" interpretation also avoids the anti-competitive consequences of the meeting of competition on a "spot" basis, as recognized in *FTC v. Sun Oil Co.*, 371 U.S. 503, 519, 523, 526-7 (1963).

Competition in the oil industry is fostered by the meeting of competition on a competitive area basis. The meeting of competition on a "spot" basis suppresses competition in the oil industry. Since the underlying goal of the antitrust laws is to foster competition, the "spot" pricing interpretation of Section 2(b) should be rejected and the "competitive area" approach adopted for the oil industry.

Assuming *arguendo* the "competitive area" interpretation advocated by California is not adopted, the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevent the oil companies from meeting competition on a "spot" basis. An oil company wishing to match a competitor's lower price offer to one dealer on a "spot" basis cannot do so since the competitor's lower price offer on a "spot" basis is illegal. If the competitor offered the same lower price to all dealers substantially in competition with each other (*i.e.*, on a "competitive area" basis), then the competitor's lower price offer is legal and may be met in good faith on a "competitive area" basis by offering a lower price to all dealers substantially competing with the favored dealers. If the oil company singles out just one of the several dealers in that competitive area and offers a lower price to the dealer singled out, the oil company would not be meeting competition in a "good faith" manner as required by the Robinson-Patman Act.

Thus the oil companies' interpretation of Section 2(b) of the Robinson-Patman Act as permitting the meeting of competition in the oil industry on a "spot" basis must be rejected. Even if Section 2(b) of the Robinson-Patman Act is construed as permitting the meeting of competition on a "spot" basis, a state may still enact a price discrim-

ination law more stringent than, or closing a loophole to, the Robinson-Patman Act if in so doing, the state statute furthers the basic purposes of the Robinson-Patman Act. The basic purposes of the Robinson-Patman Act are frustrated by the meeting of competition in the oil industry on a "spot" basis.

Finally, the oil companies' claim that Section 2(b) confers an absolute right to meet competition on a "spot" basis is soundly refuted by the limited nature of the defense.

ARGUMENT

Introduction

California wishes to present for this Court's consideration a point of view not presented by the parties (but incorporated into the California statute): the meeting of competition on a "competitive area" basis. The "competitive area" approach—an approach in between the oil companies' "spot pricing" approach and Maryland's state-wide pricing approach—insures the supplier substantial price flexibility by allowing the oil companies to meet local competition on a "competitive area" basis without injurious and unfair price discrimination between competing dealers. In so doing, the California "competitive area" approach preserves the benefits of competition which the parties each contend the opponent's approach destroys.

I. The Robinson-Patman Act Should be Construed as Requiring the Meeting of Competition in the Oil Industry on a "Competitive Area" Basis

The Robinson-Patman Act, like the California and Maryland statutes, was enacted to outlaw price discrimination. *FTC v. Sun Oil Co.*, 371 U.S. 505, 519-520 (1963). Thus, the federal and state statutes have identical purposes and objectives:

> "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source. The House Committee declared its 'guiding ideal' in proposing the amendments to be 'the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production . . .' H.R. Rep. No. 2287, 74th Cong., 2d Sess. 6. In short, Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." 371 U.S. at 520.

The section of the Robinson-Patman Act embodying the essence of the statute, the proscription of price discrimination, is Section 2(a).[1] 15 U.S.C. § 13(a). This Section essentially prohibits an oil company from discriminating in price between two of its purchasers where the discrimination adversely affects competition.

Section 2(b) of the Robinson-Patman Act[2] provides that the seller may defend against a Section 2(a) violation by

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1. This Section is virtually identical to the first paragraph of the California statute. (Cal. Bus. & Prof. Code § 21200, first paragraph.)

2. Section 2(b) of the Robinson-Patman Act provides:
> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C. § 13(b).

showing that the lower price was offered *in good faith* to meet the competition. The exact meaning of this section is, characteristically, unclear.[3]

California contends that in light of the purpose of the federal Act, the Robinson-Patman Act should be interpreted as requiring the meeting of competition in the oil industry on a "competitive area" basis.[4] This would further the

3. Mr. Justice Frankfurter's candid appraisal that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act," *Automatic Canteen Company v. FTC*, 346 U.S. 61, 65 (1953), is echoed by all who deal with the statute. "The Robinson-Patman Act has been called, among other things, 'one of the most tortuous legislative pronouncements ever to go on the statute books.' [Dirlam and Kahn, Fair Competition, The Law and Economics of Anti-Trust Policy 119 (1954).] It has been dubbed 'complex and anomalous' [Markham, Report of the Attorney-General's Committee on Anti-Trust Laws, 70 Q.J. Econ. 211], 'prolix and perplexing' [Report of the Attorney General's Committee to Study Anti-Trust Laws, 172 (1955)], and 'obscure' [*id.* at 175]. I am sure it has been called other things which have not been recorded and which could not be repeated here." Boles, *Marketing and the Robinson-Patman Act*, Southwestern Legal Foundation 1958 Institute on Anti-Trust Laws, 1, quoted in *Sun Oil Co. v. FTC*, 294 F.2d 465, 476 fn. 28 (5th Cir. 1961), *rev'd on other grounds, FTC v. Sun Oil Co., supra.*

4. The California statute specifically requires that the lower prices offered to one of an oil company's purchasers in order to meet competition must also be offered to other purchasers of that oil company who are in competition with the favored purchaser. Thus the California statute requires the meeting of competition on a "competitive area" (or "trade area") basis.

Section 21200 of the California statute provides in pertinent part:

> "... Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor *and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price* . . . ." Cal. Bus. & Prof. Code § 21200 (emphasis added).

fundamental, overriding purpose of the Robinson-Patman Act, namely, the prohibition of price discrimination. *See* page 7, *supra.*

The oil company appellants, on the other hand, seek an interpretation of the Robinson-Patman Act which would permit each to offer one of its purchasers a lower price—on a "spot" basis—to meet competition without offering the same lower price to its other purchasers in competition with the favored purchaser. Thus the oil companies seek to use Section 2(b) as a "sword" to create the very injurious price discrimination sought to be eliminated by Section 2(a) of the Robinson-Patman Act.

The meeting competition defense is an exception to the fundamental, overriding purpose of the Robinson-Patman Act, *i.e.*, to prohibit price discrimination between competing customers of the same supplier. As an exception to the Act's basic purpose, the meeting competition defense should be strictly construed to further the basic purpose of the Act.

The legislative history of Section 2(b) clearly demonstrates that Congress did not intend to allow a seller to meet competition in an *unnecessarily discriminatory* fashion. The Chairman of the House Conferees, in presenting the Conference Report, emphasized that Section 2(b)

> "cannot be construed as a carte blanche exemption to violate the bill as long as a competitor can be shown to have violated it first, *nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.*" 80 Cong. Rec. 9418 (1936) (emphasis added).

See also FTC v. Staley Mfg. Co., 324 U.S. 746 (1945) at 754, footnote 2, where this Court cites the above-quoted material as dispositive of Congressional intent in enacting Section 2(b).

Thus, in enacting Section 2(b) Congress did not authorize the use of *unnecessarily discriminatory* methods of meeting competition. The meeting of competition on a "spot" basis is unnecessarily discriminatory. It unnecessarily allows an oil company to protect "discriminatorily, sales to one customer at the expense of other customers" who compete with the favored customer. *FTC v. Sun Oil Co., supra*, 371 U.S. at 523. Such discrimination is unnecessary in the oil industry because an oil company can meet competition by extending the same lower price to those dealers in a small "competitive area" or "trade area."

This Court correctly recognized that the meeting of competition on a "spot" basis in the oligopolistic oil industry is unnecessarily discriminatory. *FTC v. Sun Oil Co., supra*, 371 U.S. at 519, 526-7. Instead, this Court suggested that competition be met on a "competitive area" basis, or that "other opportunities" such as advertising, merchandising or leasing policies be pursued. *Ibid.*

Not only is the meeting of competition in the oil industry on a "spot" basis unnecessarily discriminatory, it also is *anticompetitive*. This Court recognized the anticompetitive consequences in *FTC v. Sun Oil Co., supra:*

> "It is argued, however, that to deny Sun the right to reduce its prices [on a "spot" basis] as it did here is to impair price flexibility and promote price rigidity, the very antithesis of competition. We think that the contrary is the case. While allowance of the discriminatory price cut here may produce localized and temporary flexibility, it inevitably encourages maintenance of the long-range and generalized price rigidity which the discrimination in fact protects. *So long as the wholesaler can meet challenges to his pricing structure by wholly local and individualized responses, it has no incentive to alter its overall pricing policy.* Moreover, as indicated, the large supplier's ability to "spot price" will discourage the enterprising and resourceful retailer from seeking to initiate price reductions on his own. *Such reasoning may be particularly applicable in the oligopolistic environment of the oil industry.* 371 U.S. at 523 (emphasis supplied; citations omitted).

Hence, the meeting of competition on a "spot" basis, advocated by the oil company appellants, is anticompetitive in the context of the oil industry.[5] Meeting competition on a "competitive area" basis, as required by the California statute, promotes true price competition. *See also* pages 12-16, below.

Thus, the legislative history of Section 2(b) as well as an analysis of the effect on competition and a consideration of principles of statutory construction clearly demonstrate that the Robinson-Patman Act should be interpreted as requiring the meeting of competition on a "competitive area" basis, certainly at least in the oligopolistic oil industry.[6]

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5. The oil industry remains oligopolistic, each regional market being controlled by a few major sellers. *See Competition In The Energy Industry: Hearings, Pursuant to S.Res. 56, Sec. 4, before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 93rd Cong., 1st Sess. 2 (1973) (statement of Senator Philip S. Hart). *See also Report to the Federal Trade Commission on the Structure, Conduct, and Performance of the Western States Petroleum Industry,* FTC Bureau of Competition and Economics (Sept. 1975) at pages 14-16. For example, in 1972, nine (9) major oil companies controlled about 94% of the total refinery capacity in California. *See Economic and Statistical Report on the California Petroleum Industry,* prepared by the Antitrust Unit of the California Attorney General's Office (Oct. 17, 1974) at page 109.

6. Present case law recognizes that the meeting of competition on a competitive area basis complies with Section 2(b). *See Balian Ice Cream Co. v. Arden Farms,* 231 F.2d 356 (9th Cir. 1955), *cert. den.* 350 U.S. 991 (1956); *see also FTC v. Sun Oil Co., supra,* 371 U.S. at 526-7.

The oil companies (mis)cite several cases to support their contention that Section 2(b) requires the meeting of competition on

II. Competition in the Oil Industry is Promoted by the Meeting of Competition on a Competitive Area Basis and is Impaired by the Meeting of Competition on a "Spot" Basis

The meeting of competition in the oil industry on a competitive area basis, as compelled by the California statute, promotes competition. The oil company appellants erroneously assert that price competition is fostered when an oil company meets competition on a "spot" basis by offering one of its dealers a lower price to meet a competitor's offer without offering a lower price to competing dealers. (Appellants' Brief of Exxon Corp., Phillips Petroleum Co., Shell Oil Co. and Gulf Oil Co. [hereinafter Exxon *et al.* Br.] at 56, 71, 80-94.)

The meeting of primary line competition on a "spot" basis merely allows the oil company to hold onto that customer. The customer itself would have obtained the benefit of the lower price from the competitor. If the oil company were not able to meet competition on a "spot" basis and the oil company's competitor won the dealer's business, the competitor's sales would increase, just as true

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an "individual" or "spot" basis, not on a competitive area basis. *See* Exxon *et al.* Br. at 59, fn. 27, 73. ***FTC v. Staley Co., supra,*** holds that Section 2(b) does not allow a seller to adopt an illegal pricing system (based on phantom freight charges) in response to a competitor's use of a similar illegal pricing system (also based on phantom freight charges). *Accord*: ***FTC v. National Lead,*** 352 U.S. 419 (1957); ***FTC v. Cement Institute,*** 333 U.S. 683 (1948). ***Continental Baking Co. v. Old Homestead Baking Co.,*** 476 F.2d 97, 108 (10th Cir. 1973), ***cert. den.*** 414 U.S. 975 (1973), affirmed a denial of the Section 2(b) defense where the evidence established that defendant's lower price "had nothing whatsoever to do with any competitive move in the market." ***Tri-Valley Packing Ass'n. v. FTC,*** 329 F.2d 694, 705-6 (9th Cir. 1964), remands a price discrimination case for additional evidence as to whether the California Street market quotations corresponded to actual sales prices.

Furthermore, in industries (other than the oil industry) in which customers from the same supplier compete with one another beyond a small "competitive area" or "trade area", the meeting of competition on a "spot" basis might be proper. *Cf.* pages 13-14, *infra.*

competition requires, since the competitor's lower price presumably reflects that competitor's superior efficiency.[7]

If the oil company meets the competitor's lower price to the one station alone, without extending a price break to competing stations in the same competitive area, the oil company is meeting competition in an unncessarily discriminatory and unfair manner. Congress did not sanction the meeting of competition in an unnecessarily discriminatory fashion. *See* page 9, *supra.* An oil company's meeting of primary-line or secondary-line competition on a "spot" basis is unfair to the competing purchasers from the same oil company as they in effect subsidize the price cut to the favored dealer in paying a higher price to the oil company while suffering either a lower profit margin or lower sales.

In an oligopolistic industry like the oil industry, the first price break, if allowed to be met on a "spot" basis, is contained without spreading and triggering a new pricing structure. (In contrast, in a more perfectly competitive industry, where the seller's control over the market is small or nil, the first price break, even if met on a "spot" basis, cannot be contained because control of the market is so

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7. The meeting of secondary-line competition in the oil industry on a "spot" basis poses a serious conflict with the Sherman Act, as noted by the State of Maryland. (Appellees' Br. at 58-64.) Price verification not only risks violating the Sherman Act, it also risks the anticompetitive effects of price fixing or price stabilization. The best solution to this conflict is to allow the meeting of secondary-line competition on a competitive area basis, thereby eliminating the need or occasion for price communication between competitors.

The meeting of secondary line competition in the oil industry on a "spot" basis does not materially lower gasoline prices, for the price-conscious consumer would purchase at the lower price from the station allegedly receiving price support from the competing supplier. The lower price will be contained, and will not spread. *See* pages 13-14, *infra.* The "harm" suffered by the dealer sought to be aided on a "spot" basis is the proper result of interbrand competition.

fragmented and dispersed. Therefore, in a more perfectly competitive industry, unlike the oil industry, the first price break spreads and triggers a price restructuring.) This Court recognized the anticompetitive effect of meeting competition on a "spot" basis in the oligopolistic oil industry in *FTC v. Sun Oil Co., supra,* 371 U.S. at 523.

The meeting of competition in the oil industry on a competitive area basis, as compelled by the California statute, promotes true price competition in preventing an oil company from protecting (unnecessarily and) "discriminatorily, sales to one customer at the expense of other customers." *FTC v. Sun Oil Co., supra,* 371 U.S. at 523. In preventing the oil company from meeting challenges to its pricing structure by "wholly local and individualized responses", it gives the oil company the "incentive to alter its overall pricing policy." *Ibid.*

Thus, competition in the oil industry is promoted by meeting competition on a competitive area basis (as compelled by the California statute), not by the "spot" approach advocated by the oil companies.

In attempting to demonstrate the procompetitive effect of meeting competition on a "spot" basis, the oil companies rely on *Standard Oil Co. v. FTC,* 340 U.S. 231 (1951), and some excerpts from the legislative history of the Robinson-Patman Act indicating that Congress did not intend to require a seller to cut prices "over a wide area", "all over the country", or to "all" customers in order to meet competition. (Exxon *et al.* Br. at 81, 86-87, 90.) These bits of legislative history indicate neither Congressional approval of the oil companies' "spot" approach nor Congressional rejection of the competitive area approach. Since the meeting of competition on a competitive area basis hardly

involves the reduction of prices "all over the country" or "over a wide area" or to "all" customers, these bits of legislative history do not show Congressional approval of the "spot" approach over the competitive area approach.[8]

The oil companies' heavy reliance on the Supreme Court decision in *Standard Oil Co., supra,* is misplaced as the decision is factually inapposite to the instant case. The facts of *Standard Oil Co.* are based upon extensive price wars occurring in the economic turbulence of the 1930's, a far different economic setting than today's oligopolistic oil industry wherein a few large companies in each regional market control all facets of the industry from production to transportation to distribution to retailing. *See* footnote 5, *supra.*

That the Supreme Court's decision in *Standard Oil Co.* is limited to its factual setting of the 1930's is clear from the decision itself:

> "[I]f a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, *the seller may well find it essential, as a matter of business survival,* to meet that price rather than to lose the customer. *It might be that this customer is the seller's only available market for the major portion of the seller's product,* and that the loss of this customer would result in forcing a

8. Similarly, the oil companies' contention that "a seller constrained by law to reduce prices to some only at the cost of reducing prices to all may well end by reducing them to *none*" (Exxon *et al.* Br. at 86) is strawman since the competitive area approach does not require the seller to reduce prices to all.

The oil companies' current practice of meeting competition on a "trade area" basis demonstrates that requiring the oil companies to meet competition on a "competitive area" basis does not prevent the oil companies from meeting competition, and does not result in the oil companies' reducing prices to none. *See, e.g., Bunty v. Shell Oil Co.,* 1972 CCH Trade Cases ¶ 74,252 (D. Nev. 1972) (Yeager Aff. II, ¶ 4). *See also* Naughton Aff. (I), ¶s 4-6, 8, 11 (A. 158-160) and Naughton Aff. (II), ¶s 21-25 (Plaintiffs' Exhibit 10C:A.671-4, 465).

much higher unit cost and higher sales price upon the seller's other customers." 340 U.S. at 249-250 (emphasis supplied).

These factual assumptions as to the seller's dependence on a particular customer[9] are inapplicable to the present oligopolistic oil industry dominated not by distributors or retailers but the oil companies themselves.[10]

Therefore, competition in the oil industry is promoted by the meeting of competition on a "competitive area" basis (as compelled by the California statute) and not by the "spot" pricing approach advanced by the oil companies.

III. Even If Section 2(b) of the Robinson-Patman Act Is Not Construed as Advocated by California, the Requirements of Section 2(b) That the Competitor's Price Be Lawful and That Competition be Met "In Good Faith" Prevents the Oil Companies From Meeting Competition on a "Spot" Basis

The meeting competition defense under the Robinson-Patman Act is not available to meet the *illegal* lower price of a competitor. *See FTC v. Staley Mfg. Co., supra,* 324 U.S. at 754; *see also Standard Oil Co. v. FTC, supra,* 340 U.S. at 246. Furthermore, competition can only be met "in good faith". 15 U.S.C. § 13(b).

The requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevent oil companies from meeting competition on a "spot" basis.

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9. Likewise, the oil companies' reliance on the language in *Standard Oil, supra,* that the Robinson-Patman Act did not intend to leave a seller with "no substantial right of self defense against a price *raid* by a competitor . . ." is misplaced. (Exxon *et al.* Br. at 87.)

10. Legally, the *Standard Oil* decision does not determine whether an oil company may meet competition in an unnecessarily discriminatory manner. The *Standard Oil* decision is not addressed to this issue (as the FTC never raised it in *Standard Oil*). Thus, *Standard Oil, supra,* is factually and legally inapposite.

For example, if a competing supplier (such as Exxon) offers a lower price to one of an oil company's (Shell's) unbranded[11] dealers without offering the same lower price to all of the competing supplier's (Exxon's) dealers in competition with the oil company's (Shell's) dealer to be favored, the competing supplier (Exxon) will be violating Section 2(a) of the Robinson-Patman Act. Hence, the competing supplier's (Exxon's) lower price offer to one of an oil company's (Shell's) unbranded dealers alone would be unlawful. Since Section 2(b) cannot be used to meet an unlawful price, the oil company (Shell) cannot meet this competition on a "spot" basis (even if otherwise allowed to meet competition on a "spot" basis).

Where the competing supplier (Exxon) offers a lower price to an oil company's (Shell's) unbranded dealer and at the same time offers that lower price to its (Exxon's) dealers in the same competitive area, the oil company (Shell) can meet the competition faced by all its dealers in that competitive area by responding on a competitive area basis under the Robinson-Patman Act (and under the California statute). Should the oil company (Shell) attempt to meet the competition on a "spot" basis (by offering the lower price only to the Shell dealer to whom Exxon offered a lower price), the oil company (Shell) would not be acting in "good faith" as required by Section 2(b), since it would be protecting, "discriminatorily, sales to one customer at the expense of other customers" similarly situated. This is exactly what this Court condemned as anticompetitive in the oligopolistic oil industry in *FTC v. Sun Oil Co., supra,* 371 U.S. at 523.

The requirements that the competitor's price be lawful and that competition be met "in good faith" likewise

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11. Branded dealers and lessee-dealers are not ordinarily free to switch suppliers.

eliminates the oil company's ability to meet secondary-line competition as well. For example, if one oil company (Exxon) offers a lower price to one of its dealers without offering the same lower price to all of its dealers in competition with the favored (Exxon) dealer, the oil company (Exxon) is violating Section 2(a) of the Robinson-Patman Act and, therefore, a competing oil company (Shell) would not be able to meet secondary-line competition caused by the first oil company's lower price to its dealer (even assuming *arguendo* the meeting of secondary-line competition is permitted in the oil industry).

Where one oil company (Exxon) offers a lower price to one of its (Exxon's) dealers and at the same time extends that lower price to its dealers in the same competitive area, a competing supplier (Shell) can meet the competition faced by all of its (Shell's) dealers in the competitive area by responding on a competitive area basis under the Robinson-Patman Act (and under the California statute). Should Shell attempt to meet competition on a "spot" basis (by offering the lower price only to one of several Shell dealers competing with the favored Exxon dealers), then Shell is not acting in "good faith" as required by Section 2(b) since it is protecting, "discriminatorily, sales to one customer at the expense of other customers" similarly situated.

Therefore, even if Section 2(b) of the Robinson-Patman Act is not construed as requiring that competition in the oil industry be met on a "competitive area" basis rather than on a "spot" basis, the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevents the oil companies from meeting competition on a "spot" basis.

IV. Even If the Robinson-Patman Act Is Interpreted to Permit the Meeting of Competition in the Oil Industry on a "Spot Basis", the Supremacy Clause Allows a State to Enact a Price Discrimination Law More Stringent Than, or Closing a Loophole to, the Robinson-Patman Act as Long as the State Law Furthers the Basic Purposes of the Robinson-Patman Act

Assuming, *arguendo,* the Robinson-Patman Act permits oil companies to meet competition on a "spot" basis, the difference between the Robinson-Patman Act and a state statute prohibiting the meeting of competition on a "spot" basis does not rise to the level of an impermissible conflict under the Supremacy Clause where the possible difference merely closes a loophole to the federal statute and thereby furthers the fundamental, overriding aim of the federal statute.

The first step is to examine whether the state statute frustrates or promotes the Congressional purpose: to foster fair price competition without the use of oppressive price discriminations. Assuming no irreconcilable conflict with Congressional purpose to foster fair price competition exists, then the possible difference in the means of meeting competition must be examined to see if the possible difference is irreconcilable.

A. The Basic Aims of the Robinson-Patman Act Are Frustrated by the Meeting of Competition in the Oil Industry on a "Spot" Basis (and Furthered by the Meeting of Competition on a Competitive Area Basis)

The fundamental, overriding aim of the Robinson-Patman Act is the prohibition of price discrimination contained in Section 2(a). In enacting the Robinson-Patman Act, Congress intended to insure "that businessmen at the same functional level would start on equal competitive footing as far as price is concerned." *FTC v. Sun Oil Co., supra,* 371 U.S. at 520. Under the "spot" pricing interpretation of the meeting competition defense, an oil company *creates* price discrimination between the favored dealer and its

other purchasers competing with that dealer. Therefore, the meeting of competition on a "spot" basis frustrates the fundamental, overriding aim of the Robinson-Patman Act to insure "that businessmen at the same functional level would start on equal competitive footing as far as price is concerned." *Ibid.*

The meeting of competition on a "spot" basis has previously been shown to be anticompetitive. See Part II, *supra*. Since the basic purpose of all antitrust laws is to promote competition (a principle recognized by the oil companies, *see* Exxon *et al.* Br. at 80), the meeting of competition on a "spot" basis advocated by the oil companies frustrates the fundamental or basic purposes of the Robinson-Patman Act.

In contrast, the meeting of competition on a competitive area basis furthers the fundamental purposes of the Robinson-Patman Act. See Parts I and II, *supra*.

B. A State May Enact a Price Discrimination Law More Stringent Than, or Closing a Loophole to, the Robinson-Patman Act, as Long as the State Law Furthers the Basic Purpose of the Robinson-Patman Act

The Supremacy Clause permits a state to enact legislation imposing stricter or higher standards than imposed by a federal statute. *See e.g., Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 144 (1963); *Colorado Comm'n v. Continental,* 372 U.S. 714 (1963); *DeVeau v. Braisted,* 363 U.S. 144, 152, 153 (1960); *Cloverleaf Co. v. Patterson,* 315 U.S. 148, 162 (1942); *Mariniello v. Shell Oil Company,* 511 F.2d 853, 857 (3rd Cir. 1975); *Associated Gen. Contractors of Mass., Inc. v. Altshuler,* 361 F.Supp. 1293, 1302-1303 (D.Mass. 1973), *aff.* 490 F.2d 9, 15 (1st Cir. 1973), *cert. den.,* 416 U.S. 957 (1974); *City of New York v. Diamond,* 379 F.Supp. 503, 520 (S.D.N.Y. 1974). *See also A. H. Robins v. California Department of Health,* 59 Cal.App.3d 903 (1976), *cert. den.* 429 U.S. 1035 (1977).

The ability to enact statutes imposing higher standards than federal statutes must permit a state to enact a statute restricting or closing a loophole to a federal statute, particularly where closing or restricting the loophole *promotes* the fundamental, overriding aim of the federal statute.

Therefore, assuming that state and federal statutes are in conflict, and considering this Court's mandate to reconcile the two statutes rather than holding the state statute completely ousted, California submits that this duty can properly be met by upholding a possibly stricter state statute as valid if its effect is to close a loophole in the federal statute and thereby foster the fundamental objective of that statute.[12] California submits that the California statute is valid for these reasons.

C. Section 2(b) of the Robinson-Patman Act Confers No Absolute Right to Meet Competition

The clearly recognized limitation on the applicability of the Section 2(b) defense refutes the oil companies' erroneous assertion that Section 2(b) of the Robinson-Patman Act confers an absolute right to meet competition. (Exxon

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12. The meeting of competition on a competitive area basis does not cause an oil company to violate or risk violating the Robinson-Patman Act. *Cf.* Exxon *et al.* Br. at 71-77. A seller may meet competition on a "competitive area" basis. *See Balian Ice Cream Co. v. Arden Farms, supra; FTC v. Sun Oil Co., supra.* No primary-line violation could possibly result from the meeting of competition on a "competitive area" basis since as a practical matter primary-line violations require proof of predatory intent to injure or destroy a competitor. *See Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 696-701 (1967); *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 119, 120 (1954); *Dean Milk Co. v. FTC,* 395 F.2d 696, 707-8 (7th Cir. 1968); *Forster Mfg. Co. v. FTC,* 335 F.2d 47, 52-53 (1st Cir. 1964), *cert. den.,* 380 U.S. 906 (1965); *Anheuser-Busch v. FTC,* 289 F.2d 835, 841-844 (7th Cir. 1961). *See also* Austin T. Stickells, *Antitrust Laws* (1972), § 131 at p. 465. Proof of predatory intent to injure or destroy a competitor is, of course, inconsistent with the claim that the seller was meeting

et al. Br. at 57-8, 88-9.) This limitation also demonstrates the restricted nature of the meeting competition defense as a loophole subordinate to the fundamental, overriding aim of outlawing price discrimination between competing purchasers from the same supplier.

The meeting competition defense under the Robinson-Patman Act is not available to meet the *illegal* lower price of a competitor. *See FTC v. Staley Mfg. Co., supra,* 324 U.S. at 754; *see also Standard Oil Co. v. FTC, supra,* 340 U.S. at 246. This limitation, not contained in the language of Section 2(b), was nevertheless imposed to prevent Section 2(b) from nullifying the fundamental, overriding purpose of Section 2(a). *Ibid.*

Since an unlawful price of a competitor obviously has as much competitive consequences (if not more drastic competitive effect) on the seller as a lawful price of a competitor, Section 2(b) of the Robinson-Patman Act in no way creates any absolute "right" to meet competition.

Thus, Section 2(b) of the Robinson-Patman Act confers no absolute right to meet competition. The meeting competition defense is merely a loophole and is subordinate to the basic aim of outlawing price discrimination between competing purchasers from the same supplier.

CONCLUSION

The meeting competition defense of the Robinson-Patman Act should be construed as requiring the meeting of competition in the oil industry on a "competitive area" basis. This interpretation, which is codified in the California

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competition *in good faith*. Therefore, in meeting competition on a competitive-area basis, an oil company does not engage in a primary-line violation of the Robinson-Patman Act unless its true purpose is not to meet competition but to further a predatory intent to destroy or injure a competitor, as was the case in *Forster Mfg. Co., supra.*

statute, is in accordance with the Congressional intent not to allow the meeting of competition in an unnecessarily discriminatory manner, and promotes competition in the oil industry. The meeting of competition on a "spot" basis advocated by the oil companies impairs competition in the oil industry and therefore is contrary to the basic purpose of the antitrust laws. In urging that competition be met on a "spot" basis, the oil companies seek to use the defense as a sword to create the very injurious discrimination the Act prohibits. Since the meeting competition defense is an exception to the fundamental, overriding purpose of the Robinson-Patman Act (*i.e.*, the prohibition of price discrimination between competing customers of the same supplier), it should be strictly construed.

Even if the "competitive area" interpretation advocated by California is not adopted, the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevent the oil companies from meeting competition on a "spot" basis. An oil company cannot match a competitor's lower price offer to one dealer on a "spot" basis because the competitor's lower price offer to one dealer on a "spot" basis is illegal. If the competitor offers the same lower price to all dealers substantially in competition with each other (*i.e.*, on a "competitive area" basis), then the competitor's lower price offer is legal and may be met in good faith on a "competitive area" basis by offering a lower price to all dealers substantially competing with the favored dealers. If the oil company responds to the competitor's lower price offers by singling out just one of the several dealers in that competitive area and offering a lower price just to the one dealer singled out, the oil company would not be meeting competition in "good faith."

For all these reasons the oil companies' interpretation of Section 2(b) of the Robinson-Patman Act as permitting

the meeting of competition in the oil industry on a "spot" basis must be rejected. Even if Section 2(b) is construed as permitting the meeting of competition on a "spot" basis, a state may still enact a price discrimination law more stringent than, or closing a loophole to, the Robinson-Patman Act if in so doing, the state statute furthers the basic purposes of the Robinson-Patman Act. The basic purposes of the Robinson-Patman Act, the prohibition of price discrimination between competing customers of the same supplier and the fostering of competition, are frustrated by the meeting of competition in the oil industry on a "spot" basis. Hence, state laws requiring that competition in the oil industry be met on a basis other than a "spot" basis may be valid. Finally, the oil companies' claim that they have an absolute right to meet competition on a "spot" basis is soundly refuted by the limited nature of the defense. Therefore, state price discrimination statutes need not allow the meeting of competition on a "spot" basis in the oil industry.

Respectfully submitted,

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Attorney General of the
State of California

Amicus Curiae

Appendix A

TEXT OF THE CALIFORNIA STATUTE

California Business and Professions Code sections 21200-21203 provide:

§ 21200. Motor vehicle fuels or oils; discrimination in price

It is unlawful for any refiner, distributor, manufacturer, or transporter of motor vehicle fuels or oils engaged in business in this state, either directly or indirectly, to discriminate in price between different purchasers of motor vehicle fuels or oils of like grade and quality, where the effect of such discrimination is to lessen competition, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price. If such lower price should be incorporated into a term contract, no such contract shall as to such discriminatory price be valid for more than one year.

Nothing in this section shall prevent differentials which make only due allowance for differences in the cost of manufacture, marketing, transportation, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

Nothing in this section shall prevent persons engaged in selling motor vehicle fuels or oils in this state from selecting their own customers in bona fide transactions and not in restraint of trade.

Nothing in this section shall prevent price changes from time to time where in response to changing conditions affecting the market for, or the marketability of, the products concerned, such as, but not limited to, actual or imminent deterioration of products, distress sales under court process, or sales in good faith in discontinuance of business in the products concerned.

Nothing in this section shall apply to the purchase of motor vehicle fuels or oils for their own use by state and local agencies or public utilities.

§ 21201. Application of chapter

The provisions of this chapter shall only apply to refiners, distributors, manufacturers, or transporters of petroleum products engaged in business in this state whose total production, gasoline refining capacity or sales volume at the wholesale level is 50,000 barrels a day or more.

§ 21202. Action for damages; judgment

Any person injured by any violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney's fees.

§ 21203. Legislative findings and declaration

The Legislature finds and declares that distribution and sales of motor vehicle fuels and oils in the State of California affect the general economy of the state, the public interest and the public welfare. Competition and freedom from unreasonable discriminatory practices are essential to the fair and efficient functioning of a free market

economy. Competitive conditions are rapidly changing with resulting market dislocation. Therefore, it is further provided that any existing contracts, arrangements, or agreements with provision for prices not in compliance with this chapter shall be void on and after the effective date of this chapter as to such provisions, except for any as may be required to be extended beyond said date to comply with any applicable federal price control laws, regulations or orders.

Appendix B

ORIGINAL
FILED
JUN 11 1976
CLERK, U.S. DIST. COURT
SAN FRANCISCO

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHELL OIL COMPANY, *Plaintiff,* vs. EVELLE J. YOUNGER, Attorney General of the State of California, *Defendant.*	C-75 2691 LHB ORDER

This cause came on to be heard by this Court upon:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Because of a Lack of a Justiciable Controversy and the Non-Joinder of Interested Parties, and Motion to Dismiss or in the Alternative Stay This Action on Abstention Grounds;

2. Defendant's Notice of Three-Judge District Court Requirement; and

3. Plaintiff Shell Oil Company's Motion for Summary Judgment.

Having considered the affidavits and memoranda of points and authorities submitted in support of and in opposition to these three motions, having considered the pleadings and other papers on file, having heard the oral argument of counsel, and being fully advised herein, the Court hereby finds and decrees that:

1. Defendant's motion to dismiss, or to stay, is denied in all respects. This action presents a justiciable controversy. None of the other grounds urged by defendant in support of the motion to dismiss or to stay is valid.

2. This Court possesses the jurisdiction to deny defendant's motion to dismiss, or stay, and to decide Shell's motion for summary judgment, and the convening of a three-judge court is not required. The Court declares, and the parties have agreed in open court, that Section 2281 of the Judicial Code, 28 U.S.C. § 2281, is inapplicable to the resolution of constitutional questions arising solely under the Supremacy Clause of the United States Constitution and Shell's motion for summary judgment arises solely under the Supremacy Clause.

3. Chapter 8, Division 8 of the California Business and Professions Code (California Assembly Bill No. 950, enacted by the California Legislature in its 1975 session, signed into law on September 22, 1975 and effective January 1, 1976) is in irreconcilable conflict with the Federal Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), et seq. and under the Supremacy Clause of the United States Constitution must be, and hereby is, declared to be unconstitutional, illegal, invalid and of no force and effect. Chapter 8 of Division 8 frustrates the Congressional purpose embodied in Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), to foster and encourage price competition. Moreover, the California statute is in direct, actual conflict with the Federal Act.

There is no genuine issue of material fact relative to Shell's motion for summary judgment and plaintiff Shell is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Because of a Lack of Justiciable Con-

troversy and the Non-Joinder of Interested Parties, and Motion to Dismiss or in the Alternative Stay This Action on Abstention Grounds is denied in all respects.

2. This Court possesses the jurisdiction to deny defendant's motion to dismiss, or to stay, and to decide Shell's summary judgment motion. The convening of a three-judge court is not necessary. Section 2281 of the Judicial Code, 28 U.S.C. § 2281, is inapplicable since Shell's motion for summary judgment involves solely a claim of unconstitutionality under the Supremacy Clause of the United States Constitution.

3. Plaintiff Shell Oil Company's Motion for Summary Judgment is hereby granted on the grounds that Chapter 8, Division 8 of the California Business and Professions Code (Assembly Bill 950) is in direct, actual irreconcilable conflict with the Federal Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), et seq.

4. Plaintiff's motion in open Court to dismiss the second count of its Complaint (¶¶ 14-17), without prejudice, is hereby granted.

5. Judgment be and the same hereby is entered in favor of plaintiff Shell Oil Company and against the defendant Evelle J. Younger, Attorney General of the State of California, and Chapter 8, Division 8 of the California Business and Professions Code (Assembly Bill 950) is hereby declared and decreed to be unconstitutional, illegal, invalid and of no force and effect.

6. Evelle J. Younger, Attorney General of the State of California, and each of his successors, is hereby prohibited and enjoined from enforcing in any way against plaintiff Shell Oil Company the provisions of Chapter 8, Division 8

of the California Business and Professions Code (Assembly Bill 950).

7. Costs to be taxed by the Clerk in favor of plaintiff and against defendant.

Dated: June 11, 1976.

Lloyd H. Burke
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed
Dec. 27 1977
EMIL E. MELFI, JR., Clerk
U.S. Court of Appeals

SHELL OIL COMPANY,
Plaintiff-Appellee,
v.
EVELLE J. YOUNGER, Attorney General of the State of California,
Defendant-Appellant.

No. 76-2784
ORDER

Before: BROWNING, *TUTTLE, and ANDERSON, Circuit Judges

Submission of the appeal is vacated pending a decision by the Supreme Court of the United States in *Exxon Corp. v. Maryland, review granted* 46 U.S.L.W. 3184 (October 3, 1977).

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*Honorable Elbert Parr Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

Supreme Court, U. S.
FILED
FEB 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

OBJECTION OF APPELLANTS TO CALIFORNIA'S MOTION TO FILE TARDY AMICUS CURIAE BRIEF

(See inside cover for Counsel)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

OBJECTION OF APPELLANTS TO CALIFORNIA'S MOTION TO FILE TARDY AMICUS CURIAE BRIEF

Pursuant to Rule 42(3) of this Court's Rules, Appellants Exxon Corporation, Phillips Petroleum Company, Shell Oil Company and Gulf Oil Corporation, hereby object to the State of California's Motion for Leave to File Tardy Amicus Curiae Brief on the ground that California's motion is not permitted under this Court's Rules. Appellants further object to California's motion on the additional ground that the arguments California wishes

to present do not pertain to the validity of the Maryland statute *sub judice*, but are directed to the validity of a materially different California statute not before this Court. California's arguments thus could not materially aid the Court in the disposition of this case.

Rule 42(3) of this Court's Rules states that where consent to a filing of an *amicus curiae* brief is refused by a party, "a motion to file may *timely* be presented to the court." (Emphasis supplied). Rule 42(2) provides that a "brief of an *amicus curiae* in cases before the court on the merits may be filed *only* after order of the court or when accompanied by the written consent of all parties to the case and *presented within the time allowed for the filing of the brief of the party supported.*" (Emphasis supplied). The brief of appellees was due to be filed and was filed December 17, 1977. California's motion was not received by appellants until January 30, 1978. California's motion is thus 45 days late. There is no provision in this Court's Rules which permits a motion to file such an untimely *amicus* brief. Indeed, such an untimely *amicus* brief can only disrupt the preparation of the parties for oral argument scheduled for February 28, 1978.

The sole reason given by California for the extraordinary lateness of its motion is that in an order filed December 27, 1977, the Court of Appeals for the Ninth Circuit vacated the submission of California's appeal in *Shell Oil Co.* v. *Younger*, (Docket No. 76-2784), pending a decision by this Court in the instant case. While acknowledging that the California statute is "different" than the Maryland statute *sub judice*, California contends that its views should be heard at this late date because it fears that this Court might "inadvertently" rule on California's case. (Motion at 2-3).

California's fears do not justify the extended tardiness of its motion. First, probable jurisdiction over the ap-

peals was noted October 3, 1977. To the extent that California wished to address the validity of the Maryland statute, it had more than sufficient time to file a timely motion under Rule 42. Second, a decision by the Court in this case cannot be "dispositive" of California's appeal in the Ninth Circuit since the California statute is materially different from the Maryland statute. By seeking to argue the validity of its statute, California is, in effect, suggesting that this Court review the constitutionality of a statute not before it. This attempt to bypass the Ninth Circuit should be rejected.

CONCLUSION

For the foregoing reasons, California's Motion for Leave to File Tardy Amicus Curiae Brief should be denied.

Respectfully submitted,

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